TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible] 170.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE BARBER ASPHALT PAVING COMPANY AND THE CITY OF LOUISVILLE.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JANUARY 8, 1904.

(19,192.)

(19,192.)

SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 11, 1904.

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a UNITED STATES OF AMERICA, *District of Kentucky, Sixth Judicial Circuit,* } ss:

To the Barber Asphalt Paving Company and the City of Louisvi
Greeting:

You are hereby cited and admonished to be and appear a
session of the Supreme Court of the United States to be holden
the city of Washington, in District of Columbia, on the* 14th d
of January next, pursuant to a writ of error filed in the clerk's offi
of the court of appeals of Kentucky, wherein The Louisville a
Nashville Railroad Company is plaintiff in error, and you are
fendants in error, to show cause, if any there be, why the judgme
rendered against the said plaintiff in error, as in the said writ of er
mentioned, should not be corrected, and why speedy justice shou
not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of t
United States, this 17th day of December, in the year of our Lo
one thousand nine hundred and three, and of the Independence
the United States of America the one hundred and twenty-eighth.

A. R. BURNAM,
Chief Justice, Court of Appeals, Ky.

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* Not exceeding 30 days from the day of signing.

b [Endorsed:] Citation 1903 Dec'r 19 Filed

Service of citation accepted.
Dec. 18, '03.

BENJAMIN F. WASHER,
Att'y for Barber Asphalt Paving Company.
HENRY L. STONE,
City Attorney for City of Louisville.

c *Pleas.*

Pleas before the honorable the court of appeals of Kentucky, at the capitol, in the city of Frankfort, Kentucky, November 19th, A. D. 1903.

Present: Chief Justice Burnam, and Associate Judges Hobson, Paynter and Barker.

Caption.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
against
THE BARBER ASPHALT PAVING COMPANY and CITY OF LOUISVILLE, Appellees.

Be it remembered that heretofore, to-wit: on the 24th day of August, A. D. 1903, the appellant, by its counsel, Helm, Bruce & Helm, filed in the office of the clerk of the court of appeals of Kentucky a transcript of record, in words and figures following, to-wit:

1 # 29790.

STATE OF KENTUCKY,
County of Jefferson.

Pleas before the Honorable Shackelford Miller, judge of the Jefferson circuit court, chancery branch, first division, at the court house, in the city of Louisville, county and State aforesaid, and on the dates hereinafter named.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.
} Transcript of Record.

Be it remembered, that heretofore, to-wit: on the 21st day of August, 1901, came plaintiff, by counsel, and filed its petition and one exhibit herein.

Said petition is in words and figures as follows, to-wit:

Jefferson Circuit Court.

THE BARBER ASPHALT PAVING CO., Plaintiffs,
versus
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, CITY OF Louisville, Defendants.

The plaintiff states that prior to the 5th day of May, 1899, t board of public works of the city of Louisville submitted to t general council of the city of Louisville a grade map
2 Frankfort Ave. from Cavewood Ave., to Raymond Av which map was examined by said general council and it w thereupon resolved by the general council of the city of Louisvil that the grade of said Frankfort Ave. should be and remain as i dicated on said map, and which resolution was approved by t mayor of the city of Louisville on the 5th day of May, 1899.

Afterwards the board of public works recommended to the ge eral council of the city of Louisville for passage an ordinance e titled "An ordinance for improving a part of Frankfort Ave. fro the center line of Cavewood avenue to the center line of Raymo avenue extended." Said ordinance provided that the carriage w of Frankfort Ave. aforesaid should be forty (40) feet in width a should be improved by grading, curbing and paving with the a phalt pavement, and that said work should be done at the cost the owners of the ground on the northerly side of Frankfort Av from the center line of Clifton Ave. extended to the center line Ewing Ave. and Ewing Ave. extended and extending back to a dep of 195 feet and on the southerly side of Frankfort Ave. from t center line of Cavewood Ave. and Cavewood avenue extended to t center line of Raymond Ave. and Raymond Ave. extended and e tending back to a depth of 195 feet. The cost to be apportion among the owners of the lots of land within the limit above set o according to the number of square feet of ground owned by t parties respectively.

The plaintiff states that Frankfort avenue from Cavewood Ave. Raymond Ave. is now and was at all times herein mentioned a pri cipal public way of and in the city of Louisville, Ky., and that t territory contiguous to Frankfort Ave. between Cavewood and Ra mond Ave. is not now nor was it at any of the times herein me tioned defined into squares by principal public streets.
3 Said ordinance was duly passed by the general council the city of Louisville, and was approved on the 6th day June, 1900, by the mayor of the city of Louisville, and was pu lished on the 11th day of June, 1900, in and by the Louisville Di patch and the Louisville Anzeiger.

Plaintiff states that on the 8th day of May, 1900, the Louisvil Dispatch was a newspaper printed and published daily in the cit

of Louisville, Kentucky, in the English language, and having on said date the largest permanent *bona fide* circulation of any newspaper printed or published in said city at said time and in said language.

Plaintiff states that on the 8th day of May, 1900, the Louisville Anzeiger was a newspaper printed and published daily in the city of Louisville, Ky., in the German language, and having on the said date the largest permanent *bona fide* circulation of any newspaper printed or published at said time in said language.

That on the 8th day of May, 1900, the general council of the city of Louisville, in joint session, on a *viva voce* vote, elected and selected the said Louisville Dispatch and said Louisville Anzeiger as the official public newspapers and printers of the city of Louisville, in which to publish all ordinances, notices and advertisements of said city for and during the year next thereafter ensuing.

Afterwards the board of public works of the city of Louisville advertised in said Louisville Dispatch and Louisville Anzeiger, on the 19th day of June, 1900, and the 26th day of June, 1900, that they would on the 2nd day of July, 1900, receive bids, offers and proposals for the improvement of said Frankfort avenue, according to the provisions of said ordinance, and that the plans and specifications were on file in the office of said board, and that bond
4 with approved security would be required for the faithful performance of said contract, and the plaintiff says that on the 2nd day of July, 1900, in answer to said advertisement, the plaintiff bid, offered and proposed to the said board of public works that it would do said work at the following named rates and prices, and afterwards furnished the labor and material therefor, as follows, viz.:

6932.2 yds.	excavation at 26c	$1802.47
66.9 "	embankment at 10c	6.69
3474.7 "	curbing at 47c	1633.11
11–24 in.	corner stones at $3.50	38.50
170.3 yds.	binds at 45c	76.63
8206.3	asphalt paving at $2.00	16412.60
	Making a total of	$19970.00

and which was the lowest and best bid made to or received by the said board of public works, and as such was accepted.

Thereupon a contract was entered into by and between the said plaintiff and the City of Louisville, wherein and whereby the plaintiff agreed and bound itself to improve the carriage way of said Frankfort Ave. by grading, curbing and paving with the asphalt pavement at the rates and prices therein named being the same as the rates and prices set forth in its said bid and wherein and whereby the City of Louisville bound and obligated itself that it should be paid therefor at the rates and prices therein named.

Said contract was approved by the general council of the city of Louisville, and by the mayor of said city. The plaintiff states that it did furnish all the necessary labor and material therefor, and did grade, curb and pave the carriageway of Frankfort Ave. from Cavewood Ave. to Raymond Ave. as provided in its said contract,
5 and thereby became entitled to receive the amounts named in said contract.

Afterwards on the 20th day of December, 1900, the said board of public works advertised in the Louisville Dispatch and the Louisville Anzeiger that it would on the 22nd day of Dec., 1900, appear on the premises and inspect and try whether the said plaintiff had completed said improvement according to its said contract, and the plaintiff says that on the 22nd day of December, 1900, the said board of public works, by its deputy, did appear on the premises and inspect and try and did decide that the said plaintiff had completed its said contract, and did then and there for and on behalf and in the name of the City of Louisville receive and accept the same, and plaintiff thereby became entitled to receive said sum of $19970.00. The plaintiff says that on the 10th day of Dec., 1900, the Louisville Dispatch was a newspaper in general circulation, printed and published daily in the city of Louisville, Kentucky, in the English language, and on said 20th day of Dec., 1900, the Louisville Anzeiger was a newspaper in general circulation, printed and published in said city in the German language.

Thereupon the said board of public works made an apportionment of the cost of said improvement among the owners of the lots of land in the limits contiguous to said improvement, according to the number of square feet of ground owned by each of the parties respectively, as provided in said ordinance, and afterwards made out, issued and delivered to the said plaintiff apportionment warrants against the parties and for the amounts named in said apportionment, and among others an apportionment warrant against the defendant Louisville and Nashville Railroad Co., who was then and is now the owner and in possession of the lot of land hereinafter described for the sum of $3472.94, which apportionment warrant is dated 21st day of February, 1901, and bears interest from
6 date until paid at the rate of 6 per cent. per annum, and is secured by a superior lien on the following described lot or parcel of land in the city of Louisville, Kentucky, which lot cannot be divided without materially impairing its value, and beginning at the center line of Clifton Ave. with the north line of the right of way of the Louisville and Nashville Railroad Co. running thence eastwardly, along the north line of said right of way 407 feet, thence northwardly 10 feet, and thence again eastwardly and along the right of way of said L. & N. R. R. Co. 366 feet, thence southwardly 10 feet, and thence eastwardly and along said right of way to the center line of Ewing Ave. and thence southwardly with the center line of Ewing Ave. and Ewing avenue extended 60 feet to the south side of the right of way of the L. & N. R. R. Co. and

thence westwardly along the south side of said right of way to the center line of Clifton Ave. and Clifton Ave. extended, and thence northwardly with the center line of Clifton avenue and Clifton Ave. extended to the beginning.

The plaintiff states that it is a corporation organized under the laws of the State of West Virginia, with power to contract and be contracted with, and sue and be sued. That the defendant Louisville & Nashville Railroad Company is a corporation organized under the laws of the State of Kentucky with power to contract and be contracted with and sue and be sued. Said warrant is now long past due, and payment has been demanded, but no part thereof has been paid. Plaintiff will, if required, file herewith as part hereof copies of said ordinance, contract and apportionment attested by the comptroller of the city of Louisville, and also file herewith as part hereof said apportionment warrant.

The plaintiff states that until improved as set out in this petition, the carriageway of said Frankfort avenue had not, nor had any part thereof, been improved, and the improvement of said
7 carriageway herein set out by the plaintiff was the original improvement and construction of said street.

Wherefore the plaintiff prays that it be adjudged a superior lien on the lot of land hereinabove described for said sum, with interest thereon at the rate of 6 per cent. per annum from the date of said warrant until paid and its costs herein expended, and that said lien be enforced and said property sold, and if for any reason said property should be held not liable for said apportionment warrant or any part thereof, then and in that event that the plaintiff have judgment against the City of Louisville therefor, and for all other general, special and equitable relief to which it may be entitled.

WILLIAM FURLONG,
Attorney for Plaintiff.

Exhibit filed with foregoing petition is as follows:

At a meeting of the board of public works of the city of Louisville held at their office in said city on the 21st day of February, 1901, it was by said board ordered that L. & N. R. R. pay to the Barber Asphalt Paving Co. thirty-four hundred and seventy-two and 94/100 dollars, $3472.94, being its proportion of the cost for improving Frankfort avenue from Cavewood Ave. to Raymond chargeable to 107507 square feet of ground in Ny. side liable to assessment for said cost as per apportionment of said cost and approved by the said board of public works on the above date.

BOARD OF PUBLIC WORKS,
By ROGER G. McGRATH,
Apportionment Clerk B. of P. W.

See that this lien is released.

8 And thereupon the clerk issued summons and two copies which said summons is as follows:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the sheriff of Jefferson county Greeting:

We command you to summon Louisville & Nashville Railroad Company, City of Louisville to answer a petition filed against them in our Jefferson circuit court, by the Barber Asphalt Paving Company, and warn them that upon failure to so answer within twenty days after service hereof, if in Jefferson county, or within thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled or proof taken at petitioner's option, and make due return of this summons within sixty days from date hereof.

Witness, John H. Page, clerk of said court, this 21st day of August, 1901.

JOHN H. PAGE, *Clerk.*
H. A. LINDSAY, *D. C.*

Sheriff's return on foregoing summons is as follows:

Came to hand Aug. 31st, 1901, at 1 p. m.

Executed Sept. 9, 1901, on City of Louisville by delivering a *copy* of the within summons to C. P. Weaver, mayor thereof.

H. A. BELL, *S. J. C.*,
By H. WOODS, *D. S.*

Executed September 16th, 1901, on Louisville & Nashville Railroad Company by delivering a copy of the within summons to M. H. Smith, president of said company, he being chief officer found in this county at this time.

H. A. BELL, *S. J. C.*,
By H. WOODS, *D. S.*

9 At a court held on the 5th day of October, 1901:

This action was set at rules by the plaintiff on September 30th.

Came the defendant, City of Louisville, by counsel, and filed a demurrer to the petition, and ordered that said demurrer be and is submitted.

Said demurrer filed on the 5th day of October, 1901, is as follows:

Jefferson Circuit Court, Chancery Division.

BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
L. & N. R. R. Co. and CITY OF LOUISVILLE, Defendants.
} General Demurrer.

The defendant, City of Louisville, demurs to the petition of plaintiff because the same does not state facts sufficient to constitute or support a cause of action against it.

H. L. STONE,
City Attorney.

At a court held on the 12th day of October, 1901:

This action was set at rules by the plaintiff on October 7th.

Came the plaintiff by counsel and filed an amended petition and three exhibits herein.

Came the defendant Louisville and Nashville Railroad Company and filed its answer herein.

On motion of plaintiff ordered that this action be and is remanded to the rules.

10 Said amended petition filed on the 12th day of October, 1901, is as follows:

Jefferson Circuit Court, Chancery Division.

THE BARBER ASPHALT COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO., &C., Defendants.
} Amended Petition.

The plaintiff amends its petition herein and files herewith as parts hereof copies of the ordinance, contract and apportionment mentioned and referred to in its original petition herein.

Wherefore the plaintiff prays as in its original petition herein and for all proper relief.

WILLIAM FURLONG,
Attorney for Plaintiff.

Said exhibits filed with the foregoing amended petition are as follows:

11 No. 75, series 1900.

An ordinance for improving a part of Frankfort avenue from the center line of Cavewood avenue extended to the center line of Raymond avenue extended.

Be it ordained by the general council of the city of Louisville:

That the carriage-way of Frankfort avenue from the center line of Cavewood avenue extended to the center line of Raymond avenue extended shall be forty (40) feet in width, and shall be improved by grading, curbing and paving with the asphalt pavement. Said work shall be done in accordance with the plans and specifications on file in the office of the board of public works, and at the cost of owners of ground on the northerly side of Frankfort avenue from the center line of Clifton avenue and Clifton avenue extended, to the center line of Ewing avenue and Ewing avenue extended and extending back to a depth of 195 feet; and on the southerly side of Frankfort avenue from the center line of Cavewood avenue and Cavewood avenue extended to the center line of Raymond avenue and Raymond avenue extended and extending back to a depth of 195 feet.

The cost to be equally apportioned among the owners of property according to the number of square feet of ground owned by the parties respectively within the limits above set out, and that all ordinances in conflict herewith be and are hereby repealed.

S. F. HARLAN, *C. B. C.*
ALF W. DAVIS, *C. B. A.*
THEO. STERN, *P. B. C.*
P. B. REED, *P. B. A., Pd.*

Approved June 6, 1900.

CHAS. P. WEAVER, *Mayor.*

A copy.

Attest: ALF. W. DAVIS.

This is a true and correct copy of the original on file in my office.

JOHN H. HANCOCK,
City Comptroller.

On the back of said ordinance are the following indorsements:

Board of alderman, Nov. 2, 1899. Chas. C. Martin, C. B. A.

Board of councilmen Dec'r 13 1899, Sts. E. D. S. F. Harlan, C. B. C.

Board of councilmen May 22, 1900. Read and passed. S. F. Harlan C. B. C.

Board of alderman June 5, 1900. Engineer's committee, Alf. W. Davis, C. B. A.

Published June 11, 1900. Book 12 page 12.

No. 75 series 1900.
An ordinance for improving part of Frankfort avenue from center line of Cavewood avenue to the center line of Raymond Ave. extended
Board of councilmen June 16 1900. Sts. E. D. S. F. Harlan C. B. C.
Recommended by board of public works. C. F. Grainger, chairman.

12 *Contract for New Street Construction.*

Original.

Ordinance No. 75, series 1900.

This agreement, made the 3d day of July, 1900, between the City of Louisville, of the first part, and the Barber Asphalt Paving Company, principal, and Jacob Gast surety of the second part,

Witnesseth: that the said parties of the second part agree and bind themselves that the said The Barber Asphalt Paving Co. will improve the carriage-way of Frankfort avenue from the center line of Cavewood avenue extended to the center line of Raymond avenue extended shall be forty (40) feet in width by grading, curbing, and paving, with the asphalt pavement according to the plans and specifications exhibited at letting No. 108 of July 2nd, 1900, and now on file in the office of the board of public works, required to be so improved by an ordinance passed by the general council of said city, and approved by its mayor on the 6th day of June, 1900, and entitled "An ordinance for improving a part of Frankfort avenue from the center line of Cavewood avenue extended to the center line of Raymond avenue extended, and that said work shall be done according to the provisions of the said ordinance and the plans and specifications above mentioned, all of which are made part hereof as fully as if the same were herein inserted; and that said work shall be completed within four (4) months after the approval of this contract, or within such time thereafter as shall be directed or allowed. But the city reserves the right to have said work suspended by the board of public works whenever, for causes satisfactory to them, they shall so direct; but such suspension shall be reported to the general council for approval.

For the said work the said Barber Asphalt Paving Co. is to be paid as follows:

Items.	Written prices.	Dollars.	Cts.
For excavation, per cubic yard.....	Twenty-six cents....	0	26
For embankment, per cubic yard.....	Ten cents..	0	10
For curved curbing, per lineal foot	Forty-seven cents....	0	47
For new curbing, per lineal foot..... ..	Seventy-eight cents..	0	78
For 18-inch diam. corner stones, each...	Three dollars.....	3	00
For jointing old curbing, each.....	.....	.....	.....
For 24-inch diam. corner stones, each...	Three dollars & fifty cents.	3	50
For new binder stones, per lineal foot...	Forty-five cents	0	45
For old binder stones reset, per lineal foot.			
For vitrified brick paving, with concrete foundation and cement joints, per square yard			
For granite block paving with concrete foundation and gravel joints, per square yard			
For granite block paving with concrete foundation and cement joints, per square of 100 square feet			
For asphalt paving with concrete foundation, per square yard	Two dollars.....	2	00

12*a* *Guarantee.*

The party of the second part hereby guarantees the work done under this contract and the materials used in the construction of the same are free from defects or flaws, and this guarantee is for a term of five years from and after the acceptance of the work by the board of public works.

It is hereby further stipulated and agreed that the board of public works shall be the exclusive judge of the existence of defects in the work or materials herein mentioned, and of the extent of the work necessary to remedy the same; and further, that the appointment of inspectors by the board of public works, for the supervision of same to insure that the work and materials are in accordance with the plans and specifications prepared by the board of public works for the improvement herein mentioned, and the supervision thereof by such inspector shall in no wise relieve the contractor from the guarantee of his work as herein set forth.

It is further stipulated and agreed by the contractor and his sureties that they will pay all damages for injuries to or encroachments upon the private property of abutting lot owners, or other persons, in constructing the improvement herein mentioned, and will save the City of Louisville harmless from all loss or damage on that account; and the contractor and his sureties shall, in no event, be released from such liability, unless the injury to private property was done by the contractor under and in pursuance of the express written order of the board of public works, certified by the secretary, and after reasonable notice in writing given by the board of

public works to the abutting lot owner or owners, or other person or persons to be affected, and it is agreed by the contractor and his sureties that no other authority whatever, verbal or written, shall release them from such liability to the city, nor to the owner of the property injured or damaged, nor waive the city's right to indemnity on account thereof.

It is further agreed by the contractor that for the contract price or cost of all work mentioned above or required to be done by him under any of the provisions of this contract, he will look alone to the lot owners of the property described in the ordinance aforesaid; and that, in no event, shall he be entitled to recover any part thereof from the City of Louisville.

In testimony whereof, the name of the said city is hereto subscribed and the seal thereof affixed, and the parties of the second part hereto subscribe their names, the day and year first above written.

BOARD OF PUBLIC WORKS OF THE CITY OF LOUISVILLE,
By C. F. GRAINGER, *Chairman.*
[SEAL.] CITY OF LOUISVILLE,
By CHARLES P. WEAVER, *Mayor.*
THE BARBER ASPHALT PAVING CO., *Contractor.*
L. B. WEST, *Att'y.*
JACOB GAST,
—— ——, *Sureties.*

Attest: THOS. P. CRAIG, *Secretary B. of P. W.*

A copy.
Attest: ALF. W. DAVIS, *C. B. A.*

This is a true and correct copy of the original on file in my office.
JOHN H. HANCOCK,
City Comptroller.

Resolved, by the general council of the city of Louisville, that the within contract is hereby approved.

S. F. HARLAN, *C. B. C.* THEO. STERN, *P. B. C.*
ALF. W. DAVIS, *C. B. A.* C. T. BALLARD, *P. B. A.*

Approved — day of Aug. 2d, 1900.
CHAS. P. WEAVER, *Mayor.*

Endorsed on back as follows: Ordinance No. 75, series 1900. Street contract asphalt pavement Frankfort avenue from the center line of Cavewood avenue extended *extended* to the center line of Raymond avenue extended. The Barber Asphalt Paving Co., contractor. Date July 3d, 1900.

Board of councilmen, July 31, 1900. Approved. S. F. Harlan, C. B. C.

Board of aldermen, July 31, 1900. Approved. Alf. W. Davis, C. B. A.

Board of aldermen, July 31, 1900. Contract committee. Alf. W. Davis, C. B. A.

Board of councilmen, July 31, 1900. Contracts. S. F. Harlan, C. B. C.

13 At a meeting of the board of public works of the city of Louisville, held at their office on the 21 day of February, 1901, it appearing that the Barber Asphalt Paving Co. contractor has completed his contract for improving Frankfort avenue from the center line of Cavewood avenue extended to the center line of Raymond avenue extended, in all respects as required by his contract, and that said work has been duly and legally inspected and received by the chief engineer of the city as appears by his report made to this board, the following apportionment of the contract price of said work is now made by this board, and apportionment warrants are directed to issue in favor of the Barber Asphalt Paving Co. contractor against the various owners of property legally liable therefor for their respective proportion of the contract price of said work.

BOARD OF PUBLIC WORKS,
By C. F. GRAINGER, *Chairman.*

Chief engineer's office.

LOUISVILLE, KY., *Feb.* 21", 1901.

To the board of public works.

GENTLEMEN: The above named work was inspected after published notice on Dec. 22d, 1900, according to the provisions of the charter and the work was received as completed according to the plans, specifications, and ordinance concerning said improvement.

The Barber Asphalt Paving Co. contractor has completed his contract for improving Frankfort avenue from the center line of Cavewood avenue extended to the center line of Raymond avenue extended, by grading, curbing and paving the carriageway with the asphalt pavement according to contract approved Aug. 5th, 1900.

Summary.

6932.6 cu. yds., excavation, at 26c	$1802.47
66.9 cu. yds. embankment, at 10c	6.69
3474.7 lin. f. new curbing, at 47c	1638.11
11-24 " corner stones, at $3.50	38.50
170.3 lineal ft. binders, at 45c	76.63
8206.3 sq. yds. asphalt pavement, at $2.00	16412.60
Total amount of contract	$19970.00

Which is apportioned among the following named owners of property as per list furnished by the city assessor:
"Over"

14 Northerly side.

John Ewald	Irregular	43582	sq. ft.	$1407.89
L. & N. R. R.	"	107507	"	3472.94
Lizzie Wisenberger	"	3716	"	120.04
Mary Leonard	"	4537	"	146.56
Theresa Laufer	"	7927	"	256.08
Lizzie Wisenberger	"	3333	"	107.67
Wm. Spect	"	19825	"	640.43
Carrie Kessack	"	11326	"	365.88
Wm. Spect	"	19629	"	634.10
Christopher Bader	"	4255	"	137.45
Margaretha Widman	"	17163	"	554.44
Mrs. J. E. Speed	"	6424	"	209.14
Constant Georgel	"	4349	"	140.49
Louis Behrens	"	1645	"	53.14
Frank Bauer	"	4792	"	154.80
Louis Behrens	"	8644	"	279.24
Sallie C. Murphy	"	9247	"	298.72
J. H. Thompson	"	229	"	7.40
J. T. Davis	"	14834	"	479.20
Thos. E. Fagan	"	9528	"	307.79
Thos. E. Fagan	"	242	"	7.82
Totals northerly side		302784	sq. ft.	$9781.22

Southerly side.

Jos. Rostetter	Irregular	5578	sq. ft.	$180.19
Eliz. A. Zabel	"	6978	"	225.42
Jennie T. Conroy	30 x 165.685	4970	"	160.55
Phillip, Rosa & Chas. Kelly	30 x 165.685	4970	"	160.55
Phil, Rosa & Chas. Kelly	30 x 165.685	4970	"	160.55
John Mayer	30 x 165.685	4970	"	160.55
Geo. Oswein	30 x 165.685	4970	"	160.55
Jas. Oswein	Irregular	9900	"	319.81
15 Mrs. Josephine Wiggington	35 x 165.85	5799	"	178.33
Jas. B. Miller	Irregular	13214	"	426.88
Wilhelmenia Hiller	"	10735	"	346.79
Michael Hubrick	"	5800	"	187.37
Jno. Reiner	60 x 195	11700	"	377.96
Henrietta Marx	30 x 195	5850	"	188.98
Chas. Fust	25 x 195	4875	"	157.48
Owen McCann	30 x 195	5850	"	188.98
Wilhelmenia Messer	30 x 195	5850	"	188.98
Nellie A. Kenney	30 x 195	5850	"	188.98
Isabella Tucker	28 x 195	5460	"	176.38
Jas. H. Tinsley	27 x 195	5265	"	170.08
J. H. G. Wallbaum	36′ 8½″ x 195	7158	"	231.23
G. F. & T. P. Raymond	Irregular	4909	"	158.58
Herman Kraus	"	22854	"	738.28
Herman Kraus	50 x 180	9000	"	290.74
Rosa Bucheser	50 x 180	9000	"	290.74
Harry R. Whitesides	Irregular	19897	"	642.76
G. F. & T. P. Raymond	"	8340	"	269.42
Constant Georgel	"	10688	"	345.27
Maggie Reiter	25 x 180	4500	"	145.37
Mary Reiter	25 x 180	4500	"	145.37
Chas. Heigold	50 x 180	9000	"	290.74

Lena Zender	50 x 180	9000 sq. ft.	290.
Hy. A. Kiefer	50 x 180	9000 "	290.
Frank A. Thoman	100 x 180	18000 "	581.
Geo. Hobbs	25 x 180	4500 "	145.
Jno. M. Schoen	25 x 180	4500 "	145.
Lucy J. Nichols	100 x 180	18000 "	581.
Lucy J. Nichols	50 x 180	9000 "	290.
Totals southerly side		315400 sq. ft.	$10188.

16 *Recapitulation.*

Northerly side	302784 sq. ft.	9781.
Southerly side	315400 "	10188.
Total amount of contract	618184 sq. ft.	$19970.

Correct,
E. F. MANDEVILLE, *Calculator.*

Very respectfully,
C. W. PARSONS,
Chief Engineer.

The above apportionment is approved this 21st day of February 1901.

C. F. GRAINGER,
Chairman B. of P. W.

A copy.
Attest: ALF. W. DAVIS.

This is a true and correct copy of the original on file in my office.

JNO. H. HANCOCK,
City Comptroller.

Endorsed on back:
"Engineer's apportionment Frankfort avenue from center lin of Covewood extended to center line of Raymond avenue extende The Barber Asphalt Paving Co. contractor Reported Feb'y 2 1901 Ent. Feb'y 21, 1901, Record Book No. 6, page 164. B. P. W Craig Ent. App't Ledger 12 pages 209–210 Roger W. McGrat Ent. Book 41, p. 576.

17 Said answer of the Louisville and Nashville Railroa Company, filed on the 12th day of October, 1901, is a follows:

Jefferson Circuit Court.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, &c., Defendant.

Answer of Louisville & Nashville Railroad Company.

Defendant, The Louisville & Nashville Railroad Company, denies that it is or at the institution of this action was the owner of a lot of land described in the petition as belonging to it or to any part thereof, except in the manner and to the extent hereinafter set forth.

Par. 2. Said defendant says it is a corporation created for the purpose of owning and operating a railroad under and by an act of the General Assembly of Kentucky, entitled "An act to charter the Louisville & Nashville Railroad Company," approved March 5th, 1850, and various acts amendatory thereof.

It says it does now own and for many years has owned a line of railroad extending from Newport, Ky., to and through Louisville, Ky., and thence southwardly through Kentucky and other States.

It owns and has long owned a perpetual right of way for railroad purposes from Newport to and into Louisville over a long strip of land which is about 110 miles long, and about 66 feet wide, on which is constructed its road-bed and over which are operated its trains between and into the cities aforesaid. Occasionally for short distances the width of the right of way as above given varies, but that given above is the usual width, and is its greatest width
18 at the place referred to in the petition herein. The said right of way passes over the parcel of land described in the petition herein as belonging to this defendant; in other words, it constitutes a section of said indivisible and continuous right of way between the cities aforesaid; and the only interest of defendant in said land is an easement therein, to-wit: the perpetual right of itself, its successors and assigns to the use of the same for railroad purposes as aforesaid, and should such use be abandoned all interest of this defendant, its successors and assigns in said land would cease. Over said parcel of land, which, as aforesaid, is, at its greatest width, only 66 feet wide, is constructed a section of defendant's road-bed between its terminal property in the city aforesaid, and on the same are laid two tracks, parallel with the northerly and southerly lines of said parcel of land described in the petition, constituting what is called a double track, and being parts of defendant's two main tracks between the cities aforesaid, over which are operated its trains between said cities. On said parcel of land there are no houses or buildings, but it is used only

and is available for use only, as an indivisible part of defendant's right of way aforesaid, on which is located a section of its road-bed as aforesaid, and over which its trains pass between its terminal properties in the two cities aforesaid.

Said parcel of land over which said right of way exists as aforesaid runs practically parallel with the section of the street described in the petition as herein as having been improved. The south line of said parcel of land over which the said right of way exists, and the north line of the said street are very close together, possibly in contact with each other, at the extreme eastern and western ends thereof, and while the south line of the said right of way is a straight line the north line of the street is a curved line, the concave side thereof being toward the line of said right of way; the
19 greatest distance between said two lines being about 105 feet which is at a point about half way between the eastern and western ends of the property and street described in the petition.

Defendant says neither said parcel of land described in the petition, nor any right or interest of defendant therein is or has been or will be or can be benefitted to the slightest degree by the improvement of Frankfort avenue as set forth in the petition herein. On the contrary, the existence of said avenue and the improvement thereof, which will lead probably to an increase in the use thereof being very close to the said right of way of defendant, is a positive injury to defendant and its said right of way, rather than a benefit. Said right of way could be more safely and advantageously used by defendant for the only purpose for which it does, or can ever use it if said Frankfort avenue was entirely removed from within the territory described in plaintiff's petition as a tax district, than it can with said avenue in said district.

Defendant says that to subject said parcel of land described in the petition, or defendant's interest therein, under the ordinance referred to in the petition, to the payment of any part of the cost of the improvement of Frankfort avenue, or to compel this defendant in any way to pay any part of the cost of improving said Frankfort avenue, otherwise than by means of a general tax laid equally and uniformly upon all taxable property in the city of Louisville, will be to deprive this defendant of its property without due process of law, and would deny to it the equal protection of the laws, contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

Wherefore, defendant prays that plaintiff's petition be dismissed.

HELM, BRUCE & HELM,
Attorneys for Louisville & Nashville Railroad Co.

20 —— —— says he is the — of the Louisville & Nashville Railroad Company, and its chief officer in the county of Jefferson, and that he believes the statements in the foregoing answer are true.

—— ——.

Subscribed and sworn to before me by —— —— this — day of October, 1901.

My commission expires ——.

—— ——.

At a court held on the 19th day of October, 1901:

This action was set at rules by the plaintiff on October 14th.

By agreement of the plaintiff and defendant City of Louisville the order entered herein on October 5th, 1901, submitting this action on the demurrer of the City of Louisville is hereby set aside.

Came plaintiff by counsel and filed a demurrer to the answer of defendant Louisville & Nashville R. R. Co.

Ordered that this action be and is submitted on pending demurrers.

Said demurrer filed on the 19th day of October, 1901, is as follows:

Jefferson Circuit Court, Chancery Division.

THE BARBER ASPHALT PAVING CO., Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant. } Demurrer.

21 The plaintiff demurs to the first and second paragraphs of the answer of the defendant, The Louisville & Nashville Railroad Company, herein, because neither of said paragraphs set forth facts sufficient to constitute a defense to the plaintiffs' cause of action herein.

WILLIAM FURLONG,
Att'y for Plaintiff.

At a court held on the 9th day of November, 1901:

The court being advised delivered a written opinion herein which is ordered to be and is now filed. The opinion herein being a copy of the opinion in the case of R. B. Park & Co. *v.* Katharine Orth, & others, it is ordered that the opinion in said case be and is adopted as the opinion in this case.

It is therefore ordered in conformity with said opinion that plaintiffs' demurrer to the answer of defendant Louisville & Nashville Railroad Co. and to the first and second paragraph- thereof be and the same is hereby sustained. To which said defendant excepts.

And further ordered that one week's time be and is given said defendant to amend its answer herein.

And further ordered that the demurrer of the defendant City of Louisville to the petition herein be and the same is hereby overruled. To which said defendant excepts.

22 Jefferson Circuit Court, Chancery Division.

R. B. PARK & COMPANY, Plaintiff, vs. CATHERINE ORTH ET AL., Defendants. } Opinion upon Demurrer to Answer of the L. & N. Railroad Company.

This is an action to collect the cost of constructing Frankfort avenue.

The answer of the Louisville & Nashville Railroad Company presents two defenses: First, that it owns a right of way *nearly*, within the taxing district, and that it is not liable for street improvements; and, second, that the road's right of way has not been benefitted by the improvement, but injured rather, "because it increases the liability to accidents and injuries therein, and the cost of maintenance of its said road-bed and said right of way; and said two parcels of land could be more safely and advantageously used by the defendant for the only purpose for which it does, or can ever use them, if said Frankfort avenue were entirely removed — within the tax district set forth in plaintiffs' petition, than they can with said avenue in said district."

These two defenses are presented in the second paragraph, and should have properly been presented in separate paragraphs; but as the petition is demurred to as a whole, it will be so treated. The first paragraph of the answer being a reserve or qualified traverse is insufficient when standing alone. The demurrer to the answer will have to be overruled if either defense set up in the second paragraph be found to be a bar to a recovery.

1. Is a right of way liable for its share of the cost of the
23 construction of the street? The answer concedes that this right of way is upon land lying within the taxing district. If this right of way is exempt from liability, then the remaining lands within the taxing district must pay this portion of the tax, which has been assigned to the railroad for payment. The road has exclusive possession and occupancy of this land, which it holds as a perpetual right of way. There is no claim that the assessment of the cost of the improvement is unfair or inequitable in amount, or that the work has not been done properly or according to contract; but only that the defendant road ought not to be required to pay any part of the cost of this improvement, because it owns a right of way *nearly*, and not the fee in the land which constitutes the right of way. I use the last expression advisedly, because for all practical purposes, and especially for the purpose of taxation, the right of way and the land which it occupies are one and the same thing. A distinction to the effect that the land is the tangible property, while the right of way over the land, and occupying it to the exclusion of others, is an intangible and different thing is too etherial for practical purposes when we come to distribute the public burdens. Our constitution and laws contemplate an attempt

to arrive at a uniformity of taxation and public burdens. Our courts are burdened with complaints against unequal public burdens imposed, and whenever it appears that the burden has been unfairly apportioned, or illegally imposed, the courts correct the wrong. The defense *here* presented here by the railroad is one of exemption. A complete exoneration from any portion of this public burden.

It is well settled that the exemption must clearly exist, and
24 that statutes granting exemptions are to be strictly constructed.

City of Louisville *v.* Board of Trade, 90 Ky., 409;
Kilgus *v.* Orphanage, 94 Ky., 439.

It is a personal privilege and cannot be transferred or assigned, even when it clearly exists, to a successor.

Commonwealth *v.* Masonic Temple Co., 87 Ky., 349;
Wells *v.* Savannah, 181 U. S.
Railroads *v.* Adams, 180 U. S., 26, *et seq.*

Section 170 of the constitution specifies that property is exempt from taxation, and further provides that "All laws exempting or committing property from taxation other than the property mentioned shall be void."

The exemption here claimed, is not claimed by virtue of any statute. And although the defendant's property might be exempted from the ordinary annual tax levy, it would nevertheless be liable for its share of the cost of a public street improvement, such as we have here.

Broadway Baptist Church *v.* McAtee, 8 Bush, 508;
Zable *v.* Louisville Baptist Orphans' Home, 92 Ky., 93.

But it is plain that the exemption or non-liability exists here because the defendant's right of way was never liable to be taxed for this improvement. This is but another way of stating the same proposition, for if the right of way cannot be taxed for this improvement, the inability to tax it, must arise from some exemption, which takes it out of the rule of taxation applicable to all property alike. The statute authorizing this improvement (sec. 2833, Ky. Statutes) provides that it "shall be made at the exclusive cost of the *owners of lots* in each fourth of a square, to be equally apportioned by the board of public works, according to the number *of square*
25 *feet* owned by them respectively."

It was suggested in argument that possibly the term "*lots*" so used did not refer to or include the right of way of a railroad, or so much thereof as was included in the fourth of a square. It seems clear, however, that the statute meant to impose the burden upon the amount of land in the quarter square according to the number of *square feet*, owned by each land owner, and the use of the word

"lots" is immaterial, since its meaning is thereafter defined by th statute.

The realty of a railroad is liable for its share of the cost of a stree improvement in like manner as the realty of an individual is liabl

In L. C. & L. R. R. Co. *v.* Obst & Stengel, Miss., opinion Februar 23, 1875 (a street warrant case), Judge Lindsay said:

"Real property held by railroad companies within the corporat limits of the city of Louisville, is not exempt from taxation. Th term of the grant of the power to tax for such purposes, includes al real estate and that held by railroad companies, like that held b churches, colleges and hospitals, and other institutions of like char acter, must bear its proportion of the local burden. There is n constitutional restriction upon the power of the legislature to im pose local taxation upon railroad companies. It is a mere questio of policy."

In the City of Ludlow *v.* Trustees of the Cincinnati Southern Rail way, 78 Ky., 357, decided March 4th, 1880, the court, in an opinio by Judge Hines, held that a lot upon the street owned by the sai railway company was subjected to an assessment for the improve ment of such street by the city of Ludlow, and the fact that the lo was the property of a railroad company, and used for railroa
26 purposes, furnish- no more reason why it should be exemp from an assessment than if it belonged to a natural person The same contentions were made in that case as are made by de fendant, L. and N. Railroad Company, in the second paragraph o its answer, viz: (1) That its property was not benefitted by theim provement, and (2) that it had been withdrawn from the ordinary use for which town lots are appropriated, and had become a part o the railway essential to its operation, and it was not within the pol icy of the law subjecting town lots to such local burden. There i appeared that the lot supported a portion of the masonary of the road bed, and was essential to the proper drainage of the tract. The as sessment was made on the lots in proportion to the number of front feet, and in accordance with the provisions of the charter of the city of Ludlow. With reference to the contention that the lot was necessary for the operation of the railway, and that it is contrary to public policy to subject it to such burdens, the court, after review ing the authorities cited by the railroad company's counsel, holding that the property of a railroad company could not be sold in parcels to satisfy a lien or tax, said (*ib.*, 362):

"These cases bear upon the case under considera tion in so far as to furnish *or* construction for statutes laying local burdens upon such *quasi* public corporations as railroads, but when the rule is ap plied to assessment for local improvement, where the statute directs that the property assessed be sold to satisfy the claim, and *directs the manner in which it shall be sold*, it will be found not to forbid the fragmentary sales against which those cases are directed."

Still further, in support of the conclusion reached, Judge Hines states (*ib.*, 362-63):

"But if there were any doubt on this point, we would not hesitate on the authority of the L. C. & Lex. R. R. Co. and the Louis-
27 ville Transfer Company *v.* Obst & Stengel, decided by this court in February, 1875, to hold that the property of the company should be sold to satisfy the assessment. In that case the *road-bed* and the grounds belonging to the company were directed to be sold to satisfy a sum assessed against the companies for street improvement, and under a charter of the city of Louisville, similar in this respect to the charter of the city of Ludlow. In the opinion in that case, which was delivered by Judge Lindsay, who delivered the opinion in the Elizabethtown and Paducah Railroad case, it is said: "Real property held by railroad companies within the corporate limits of the city of Louisville is not exempt from street taxation. The terms of the grant of the power to tax for such purposes includes all real estate, and that held by railroad companies, like that held by churches, colleges, hospitals, and other institutions of like character, must bear its proportion of the local burden. There is no constitutional restriction upon the power of the legislature to impose local taxation upon railroad companies. It is a mere question of policy."

Judge Hines then proceeds to quote authorities in other States, and concluded as follows:

"We think that, both upon reasons and authority, a lot held and owned by the railway company as this is held and used, is as much subject to assessment for street improvements as if it belonged to a natural person. In the law authorizing the assessment there is no exemption of railroad property, nor exemption of property because of its application to certain uses."

It will be observed that of the authorities cited and approved by the court of appeals in the opinion rendered by Judge
28 Hines, many of the cases — where the right of way of the railroad company was sought to be subjected to the assessment for local improvement. In the Ludlow case the lot sought to be subjected really formed a part of the railroad company's right of way, as it supported the masonary that upheld the tracks of the railroad company in the city of Ludlow. In other words, if it had been sold under the lien for the local assessment and purchased by a stranger, the railroad company's operation of its railroad would have been materially interfered with. But that fact does not appear to have formed any valid objection to the enforcement of the lien.

It is admitted in the company's answer in this case that it owned a perpetual right of way for railroad purposes from Newport to Louisville covering the land embraced by the local assessment sued on by plaintiffs herein. This perpetual right of way, practically amounts to the fee simple title. But it is unimportant what kind of title the defendant railroad company owns. All real estate within the area of the district to this local assessment, must stand the burden thereof.

The term "right of way" is defined as being "*the strip of land of* which a railroad company acquires either the ownership or the use for the laying of its tracks." (Century Dictionary, *verb* "way.") In common usage also the term means the land itself which is held and not the mere easement to use it in common with some one else.

It should be borne in mind that defendant's right of way is not the ordinary easement by which one man can go upon or across his neighbor's land in common with his neighbor; but it amounts to an exclusive appropriation of so much land which no one else can use in the way that the railroad uses it, or in any way to in-
29 terfere with the road's use of it. This amounts to an ownership of the present estate to continue at the will of the owner. It may be considered as settled that the owner of the estate for life must pay the cost of these public improvements.

5. Hackworth *v.* Louisville Artificial Stone Co., 20 Ky. L. R., 1789.

The answer states that the defendant has only a perpetual easement for railroad purposes, and should that use of the land be abandoned, the road's interest in the land would cease. It may also be said, that when the road's use and ownership in the land ceases, its obligation to pay the taxes thereon will also cease. While there is not entire uniformity in the cases upon this subject, the great weight of authority and reason sustains the view above given.

The Illinois Central Railroad Company *v.* East Lake Fork Special Drainage District Commissioners, 129 Illinois, 417, it was held that the assessment was enforcible against such railroad property. The supreme court of Illinois has repeatedly held that such local assessment was enforcible against the right of way of the railroad company.

41 Ill., 306;
60 *ib.*, 367;
90 *ib.*, 573;
32 Am. Rep., 54;
120 Ill., 104;
153 *ib.*, 649.

The Indiana supreme court has held likewise:
Penn. & I. R. R. Co., *v.* Hanna, 68 Ind., 562;
Indianapolis P. & C. R. Co. *v.* Ross., 47 Ind., 25.

The same principle has been established in other States.
30 Burlington & Mo. Ry. *v.* Spearman, 12 Iowa, 112;
New Haven *v.* Fair Haven & W. Ry. Co., 38 Conn., 422;
Columbus *v.* Street Ry. Co., 45 Ohio St., 98;
In re Cedar Park, How. Pr. N. S. (N. Y.), 257;
Appeal of North Beach *v.* M. R. Co., 32 Cal., 499;
City of Passaic, 54 N. J. L., 340;
42 N. J. L., 102;
Northern Indiana R. Co. *v.* Connelly, 10 O. St., 159;
Troy & L. R. R. Co. *v.* Kane, 9 Hun., 506;
1 S. Dak., 46.

The Illinois Central Railroad Company *v.* City of Decatur, 147 U. S., 190, it appeared that in 1887 proceedings were had in the county court of Macon county, in the State of Illinois, to defray the cost of grading and paving a certain street in the city of Decatur. Under those proceedings two separate parcels of land belonging to the Illinois Central Railroad Company and forming part of its right of way were assessed to the amount of $262.70. The company objected to this assessment. The objection was overruled, and a judgment entered by the county court against the two parcels of land. Exceptions were taken and an appeal allowed to the supreme court of that State. In that court the ruling of the county court was sustained, and the judgment affirmed, and the case was taken to the Supreme Court of the United States on a writ of error. It was contended by counsel for the plaintiff in error that the assessments were made without regard to benefits, or whether the property assessed for the cost of such improvement was benefitted thereby, and also that the road bed or right of way of a railroad company derived no special benefit from the paving of a
31 street which crosses it, and for that reason is not subject to assessment. The Supreme Court in an opinion by Mr. Justice Brewer, affirmed the judgment of the supreme court of Illinois, and held that the right of way was subject to the law for the cost of the improvement upon the theory that it benefitted thereby.

In the case of City of New Haven *v.* Fair Haven and Westville Railroad Company, 38 Conn., 422 (3 A. Ry. & C. A., 230), action was brought against a street railway to recover the amount of benefits assessed upon defendant for its proportionate part of the expense incurred in *paving a street in and through which the defendant's tract was laid.*

The defendant interposed a defense that it was not liable, and the city charter did not authorize an assessment upon defendant's property, its franchise or tracks in the street.

The statute authorized the court of common council to order the improvement, and when the improvement was executed :

" To assess upon the person whose property is especially benefitted a proportionate and reasonable part of the expense thereof, and may estimate the particular amount of such expense to be paid by such person," etc.

The property of defendant consists of rails, sleepers, ties and spikes laid into and attached to the soil in the street where the improvement was made to become a part of the realty.

The property was held to be real estate, and was liable to assessment, but the question as to the liability of the franchise was not passed upon.

In the case of City of Chicago *v.* Baer, 41 Illinois, 306, the common council of Chicago passed an ordinance to curb and pave Clark street. The real estate deemed benefitted by the improvement was assessed, and the assessment was reported to the council,
32 which approved it, and warrants issued for the cost thereof. Judgment against benefitted lots were asked and resisted,

and the court sustained the objection of lot owners, and refuse judgment, which was appealed.

A street railway company had possession of a considerable portio of the street by its road-bed, ties, rails, and cars, and no assessmer was made against the street railway company for any part of the in provement, although it seemed to have been largely benefitted b the improvement although the record did not disclose anything o that point. The railway was assessed because it was not considere liable by the city authorities for any portion of the expense, and th case was submitted on the single question: Was the railway com pany liable for any part of the expense, it being admitted that was benefitted by the improvement? The charter of the street rai way company authorized it to construct and operate a railway i the streets of Chicago upon such terms as might be agreed upon b the council. The council passed an ordinance by which terms wer fixed which were accepted by the railway company.

In a previous case, Chicago *v.* Larned, 34 Ill., 267, it was held tha all taxation, general and special, must be imposed equally, or in th ratio of benefits, and that rule was approved. In the Larned case it was insisted that the railway company had no real estate, but mere right of way, the court said:

"The position is ingenious, but unsound. The assessment mus be laid upon all property that is substantially and directly bene fitted. This necessarily excludes all personal property of a mov able nature. Its value cannot be affected by laying this pavement

But every estate in land adjacent to the street, whether in fe
33 or life, or for a term of years, may be increased in value. I adjacent property is held under a lease of fifty or a hundre years, the benefit to the property arising from replacing an old by new pavement would probably accrue wholly to the lessee.

The pavement would probably be worn out before the expiratio of the lease, and, therefore, the benefit which might accrue to th owner of the fee would be so uncertain and remote as not to b taken into the account. In a case of that character as between th lessee and the owner of the fee the former would undoubtedly b required to pay the entire assessment. Prettyman *v.* Walston, 3 Ill., 191.

Now, it is true, as urged by counsel, that the railway company has not become the owner of any portion of these streets in fee, bu it has certainly through its charter from the legislature, and it contract with the city, acquired a property in them of the most val uable character, which neither the legislature nor the city ca take away without the consent of the company, and capable, lik other property, of being sold and conveyed. The city council ha made a contract with the company by which it has granted to th latter what is substantially a lease hold interest in a portion of thi street for return by the original ordinance, of 25 years. The legis lature at its last session extended the character to ninety-nine years but whether the city council has extended the term for occupyin

the street, this record does not inform us. The terms offered by the city in its ordinance were formerly accepted by the company, and it executed a bond to the city, to secure compliance on its part. By this contract the railway company acquires the right to occupy a certain portion of the street by its ties, rails, and cars, so far
34 as may be necessary for operating the railway. It has acquired rights in the street which neither any other person or company, nor the general public, possessed. It can now occupy the street in a manner which would not be permitted without the aid of legislation. If a private individual were to occupy a street in this manner without authority from the city council, he would be liable to prosecution.

It is wholly unnecessary to define for the purpose of this case what is the precise extent or nature of its property.

Certain it is that this railway company has a franchise appurtenant to this street; that through this franchise it has a right of occupancy in a portion of the street peculiar to itself, and, so far as may be necessary to run its cars, exclusive; that this right of occupancy is secured for a long term of years; that this franchise and its right of occupancy together constitute a property fixed and immovable in its character, like realty, and is recognized and protected by the law as fully as a fee simple in land; that this property is of a character to be substantially and directly benefited by the proposed payment; and that in proportion as it is thus benefited it should contribute its share to the cost of the improvement in common with other property upon the street."

In Chicago City Railway Company *v.* City of Chicago, 90 Ill., 573, the street along and upon which the railway was operated was widened by condemnation proceedings at a cost of $84,299.62, which was apportioned among those benefited, and there was assessed an assessment of

"*$1686.00 on the right of way right of occupancy franchise and interest of the Chicago City Railway Company in State street, in the city of Chicago.*"

35 Which was for the benefit the company would derive by widening State street at the point and along which their track was laid and their cars were run.

The railway company objected to the assessment, which was confirmed and appeal taken by the company, which contended that it had no such property or title to property as was embraced in the city charter. The appellate court held the company liable for the assessment.

In Little *v.* City of Chicago, 46 Illinois Appeal, 534, the court said:

"When railway property is specifically benefited by an improvemen, it is not only the right *of way* but the duty of the municipal authority to include it in the assessment made upon the property benefited, and an omission to do so may render the assessment upon other property invalid."

Counsel for railroad company has cited two Iowa cases: City of Muscatine *v.* Railway Company, 88 Iowa, 291; Koons *v.* Lucas, 52 Iowa, 177.

These cases are not like our case, for they are founded on a different statute. In the Iowa cases the statute gave the council power,

"To levy a special tax on the lots and parcels of land *fronting on which highway or alley to pay the expense of such improvements.*"

Under that statute the assessment or cost is confined to land fronting the street, while under the Kentucky statute the cost is apportioned to every square foot within the prescribed territory.

In the Iowa case the street railway has a mere easement in the street, while in the case at bar there is no attempt to assess the land in the street, but to assess the land of railway company within the designated territory.

36 The cases of Chicago *v.* Baer, 41 Ill., 306, The City of New Haven *v.* F. H. & W. R. R. Co., 38 Conn., 4022, cited *supra*, have been approved by the court of appeals of Kentucky, for that court in the case of Ludlow *v.* Cincinnati Southern Railway Company, 78 Ky., 363, says in speaking of them:

"The rulings of the court of last resort in other States are almost uniformly in accord with the decision of this court upon this question."

And again, in the same case, the court said, in speaking of assessment of real property:

"In the law authorizing the assessment there is no exemption of railroad property or exemption of property because of its application to certain uses."

The exclusive "use of a perpetual right of way for railroad purposes," such as the defendant has, *in* in effect the same as a fee, and if the fee cannot escape, the easement should not. An easement can be sold and conveyed and the owner thereof can maintain an ejectment against squatters and trespassers, and the only limitation or difference between that easement and the fee — that when the railway company abandons its use, it reverts to the owner.

A railroad company has no right to hold property for other than railroad uses, such as right of way, etc., and if the road-bed or right of way was liable in the Obst case, there is no good reason why it should not be liable in this case.

As heretofore stated, the second defense is that:

"Neither of said parcels of land nor any right or interest of defendant is, or has been, or will be, or can be, benefited *by* the slightest degree by the improvement of Frankfort avenue."

37 The answer goes further, and specifies the reason why the improvement is an injury:

"Crossing defendant's said right of way at an acute angle, as it does, is a positive injury to the defendant and its said right of way rather than a benefit, *because it increases the liability to accidents and injuries thereon, and the cost of maintenance of its said road-bed* and

right of way: and said two parcels of *land could be more safely and advantageously used* by the defendant for the only purpose for which it does or ever can use them, if *said Frankfort avenue were entirely removed from within the taxed district* set forth in plaintiffs' petition, *than they can with said avenue in said district.*"

Waiving for the present, the precise question presented by this defense, the broader question of relative injuries and benefits arising from such improvements will *not* be noticed briefly.

The question of benefits is determined by the legislature, and cannot be raised, as is attempted to be done in this case, by the L. & N. R. R. Co. in the second paragraph of its answer. Being a matter for the legislature to determine, the courts will not interfere except in cases of spoilation. This has been frequently determined by our court of appeals.

McFerran *v.* Alloway, 14 Bush, 580;
Ludlow *v.* C. S. Ry. Co., 78 Ky., 357;
Preston *v.* Rudd, 7 Ky. L. R., 809;
Purdy *v.* Drake, 17 Ky. L. R., 819;
Allen *v.* Woods, 20 Ky. L. R., 60;
Bullitt *v.* Selvage, 20 Ky. L. R., 599;
Woodward *v.* Collett, 20 *ib.*, 1067.

38 In Justice Brewer's opinion, *supra*, on this point, speaking of the contracts between the Illinois Central Railroad Company and the State of Illinois *Central Railroad Company and the State of Illinois*, he says:

"There was nothing in the term of that contract to prevent the State from committing the final determination of the question of benefits to the city council rather than leaving the matter of ascertainment to a jury. And whether the charges are called special taxes or special assessments, and by whatever tribunal, or by whatever mode, the question of benefits may be determined, the fact remains that the charges are for a local improvement and cast upon the con*tingents* property upon the assumption that it has received a benefit from such improvement, which benefit justifies the charge." (147 U. S., 208.)

The answer further alleges that the defendant will be deprived of its property without due process of law, and that it will be denied the equal protection of the laws, contrary to the provision of the 14th amendment of the Federal Constitution if its property be held for any part of the cost of this improvement.

It does not say why it would be so deprived, or wherein the defendant is denied the equal protection of the law. If it does not pay its share of this public improvement, it is easy to see that the other land owners might complain of unequal burden because their proportions of this tax would be increased — the defendant railroad.

In the oral argument, however, much stress was laid upon the case of Norwood *v.* Baker, 172 U. S., 269, as authority for holding this assessment unenforcible under the allegation of the answer

that that defendant has been injured and not benefited
39 this improvement. I do not deem it necessary to go int
discussion of that case, or the latter case of French *v.* Barb
Asphalt Company, 181 U. S., 324, because the act under which
work was done expressly provides that the general council or
courts in which suit may be brought "shall make all correctio
rules and orders to do justice to all parties concerned." (Ky., s
2834.)

This section is but a repetition of the former charter of the c
of Louisville which was held in Walston *v.* Nevan, 128 U. S., 5
to be*ing* constitutional, and not in violation of the fourteen
amendment to the Federal Constitution, because it did not affo
the parties due process of law.

That decision has been followed at least six times by the U.
Supreme Court, viz:

Palmer *v.* McMahon, 133 U. S., 669;
R. R. Co. *v.* Penn., 134, I. B., 240;
District *v.* Bradling, 164 *ib.*, 175–177;
R. R. Company *v.* Ellis, 165 *ib.*, 155;
Braunan *v.* Rose, 167 *ib.*, 689, 690;
Holden *v.* Hardy, 169 *ib.*, 384.

The question was again considered in French *v.* Barbour, *sup*
and very elaborately by our court of appeals in the very late ca
of Barfield *v.* Gleason, 23 Ky. L. R., 128 (decided after French
Barbour was decided), and with the result that our statute w
again upheld as not being violative of the fourteenth amendmen
the statute being constitutional, the only way to avoid the t
under this answer would be to show some peculiar and extraor
nary hardship which amounts to actual confiscation of the defen
ant's private property to the public use, within the rule as la
down in Preston *v.* Rudd, 84 Ky., 156. That rule, as a
40 nounced by Judge Holt, is as follows:

"Such assessments are made upon the assumption that
portion of the community are benefited by the improvement, th
principle is that the territory is benefited; that it has a commo
interest, and that, governed by equitable rules, it must equally be
the burden. Necessarily individual cases of hardship will arise
but it approaches equality as nearly as is practicable. It follow
that a lot owner may be compelled to pay his proportion of the co
of an improvement although in his particular case the property ma
not be benefited.

This rule, however, cannot be so extended as to entirely take fro
the citizen his property. This would work 'a manifest injustice
It would be spo*il*ation, and not taxation. Under the guise
benefit and taxation, he cannot be thus arbitrarily deprived of h
property.

It would be but an appropriation of it by the exercise of arbitrar
power to public use without compensation."

If the answer in this case has stated facts showing injury to defendant by reason of the construction of the street, the demurrer thereto would have been overruled, in order that evidence might be heard upon that issue with the view of doing justice to all parties by correcting the apportionment if necessary. But the answer does not show any damage in its specification. It only claims that it is not benefited by the *improvement* of Frankfort avenue, but the said *improvement* is an injury because *the avenue crosses the right of way at an acute angle, which fact increases the liability to accidents, and the cost of the maintenance*,—presumably in the way of additional watchmen. It is further specified that the company could
41 use the ground more safely and advantageously "*if said Frankfort avenue were entirely removed from within the tax district;*" but it is not stated why, unless it be inferred from the preceding reference to accidents and expense of maintenance. A fair construction of this language of the answer warrants the conclusion that defendant is compelled to have a watchman at said crossing, but it is not alleged, that this necessity has either arisen or grown by reason of the improvement of the street. It is nowhere alleged that the grade of the street has been changed, or that the construction of the street has put any additional burdens upon the defendant company.

If the defendant had found it necessary to have a guard at this crossing before the street was constructed, and its grade remained substantially the same, it is difficult to see how it has been damaged by the improvement or construction of what was formerly a country turnpike road into a street of the city. All these allegations of the answer, taken in their strongest terms, apply to the conditions of affairs, which existed before the improvement was made, equally as well as to its present condition.

Furthermore, if by reversing the rule applicable to the construction of pleadings, we would view the answer in the light in which it could be most favorable to defendant, and conclude that Frankfort avenue was now for the first time extended across defendant's right of way in the usual and ordinary way, it is exceedingly doubtful whether the injury complained of is to be considered in determining the question of comparative benefits and injuries caused by the construction of the street. Is it not rather one of those incidental injuries arising out of the necessary growth of the city in population and in the extent of its limits which every citizen must bear from the very necessity of the situation? If the rail-
42 road and the turnpike have intersected for years, as they now do, and the travel and growth in population have made it necessary for the company to have a guard there for the prevention of accidents, certainly the mere improvement of the turnpike by putting down curbstones and paving it with asphaltum is no injury to the company.

It must show special damage by reason of the construction and improvement of the street, not damage or mere inconvenience by

reason of the existence of the street, which would be equally tru
of any street or road, crossing a railroad track in a thickly settle
community. It is, however, argued that it must be conceded tha
a right of way is the one species of property that can derive n
possible benefit from street improvements. That is a proposition o
fact, rather than of law, and being a question of fact, I should b
slow either to affirm or deny its correctness in the absence of testi
mony.

It might be easy, however, to imagine a state of affairs — which the construction or improvement of a road or street might be very bene ficial to a railroad, and also to its right of way, if it be insisted that they are different properties. If the defendant had a station for receiving and discharging freight or passengers, at or near this crossing, an increase in the facilities for getting to and from the station would certainly be beneficial to the company.

Other citizens and property holders are benefited in the same way, in the increased facilities for travel presented by the good road or street. I cannot agree to the proposition that the law presumes, or declares as a matter of law, that the road bed or
43 the right of way of a railroad company is not benefited by the improvement of a contiguous street. If any presumption arises, it is the presumption which arises in such cases against individuals generally, namely, that benefits have accrued to the adjoining property. Any other view must rest upon the erroneous assumption that the road-bed and the right of way do not constitute parts of the property of the railroad company. As before stated, however, it is not necessary to decide that question now, because the answer is defective in not showing what new or additional injury it has suffered by reason of the improvement or construction of the street, not the injury it states by reason of the existence of the street and the crossing. In the absence of an allegation, the court cannot presume that the condition of affairs, which exists by reason of the crossing, etc., was brought about by the improvement or construction of the street. The language of the answer rather indicates that the present condition and alleged injury is of long standing.

The demurrer to the answer will therefore be sustained; with leave to amend, if it is so desired.

SHACKELFORD MILLER, *Judge.*

44 At a court held on the 30th day of November, 1901:

This action was set at rules by the plaintiff on the 25th inst.

On motion of defendants, by counsel, it is ordered that this action be and is remanded to the rules.

At a court held on the 7th day of December, 1901:

This action was set at rules by the plaintiff on the 2nd inst.

Came the defendant by counsel and filed its amended answer herein.

Ordered that this action be and is remanded to the rules.

Said amended answer filed on the 7th day of December, 1901, is as follows:

Jefferson Circuit Court, Chancery Division.

BARBER ASPHALT PAVING CO., Plaintiff, vs. LOUISVILLE & NASHVILLE RAILROAD Company, &c., Appellees. } Amendment to Answer of Louisville & Nashville Railroad Company.

The Louisville and Nashville Railroad Company, for amendment to its answer herein, says the territory contiguous to Frankfort avenue, and north thereof, between Cavewood avenue and Raymond avenue is now, and was at all the times mentioned in the petition herein, defined into squares by principal public streets; and
45 that the principal public street next north of Frankfort avenue between the streets aforesaid, is much more than 390 feet distant therefrom.

Wherefore defendant prays as heretofore.

HELM, BRUCE & HELM,
Att'ys for Defendant L. & N. R. Co.

At a court held on the 21st day of December, 1901:

Notice being waived, came plaintiff by counsel and filed a reply to the amended answer herein.

Said reply filed on the 21st day of December, 1901, is as follows:

Jefferson Circuit Court, Chancery Division.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff, vs. LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant. } Reply.

The plaintiff, by way of reply to the amended answer of the defendants, The Louisville & Nashville Railroad, filed herein on December 7, 1901, denies that the territory contiguous to Frankfort avenue or north thereof, between Cavewood and Raymond avenue is now or was at all or at any of the time mentioned in the petition herein, defined into squares by principal public streets.

Wherefore, the plaintiff prays as in *his* petition herein.

WILLIAM FURLONG,
Att'ys for Plaintiff.

46 At a court held on the 25th day of January, 1902:

This action was set at rules by the plaintiff on the 20th inst.

On motion of defendant, by counsel, ordered that this action be and is remanded to the rules.

At a court held on the 1st day of February, 1902:
This action was set at rules by the plaintiff on January 27th.
Ordered that this action be and is submitted.

At a court held on the 15th day of March, 1902:
The court being advised, delivered a written opinion, which is ordered to be and is now filed and made part of the record herein.

47 Jefferson Circuit Court, Chancery Division.

BARBER ASPHALT PAVING Co., Plaintiffs,
vs.
L. & N. R. R. Co., Defendant.
} Opinion.

The apportionment of the cost of the improvement of Frankfort avenue is the only question argued upon this submission.

Frankfort avenue, as here improved, extends in an irregular line from Clifton avenue eastwardly to Ewing avenue, a distance (in a straight line) of about 1,750 feet. This territory on the north is intersected by two cross streets, Keats avenue and Jane street, running northwardly and southwardly. Keats avenue is 455 feet west of Ewing avenue; Jane street is 459 feet west of Keats avenue; while Clifton avenue is about 790 feet west of Jane street.

It is claimed by the defendant that Sycamore street is the next principal street north of Frankfort avenue, and that the taxing district on the north should extend one half the distance from Frankfort avenue to Sycamore street as required by section 2833 of the Kentucky Statutes. Sycamore street is not parallel with Frankfort avenue. On Ewing avenue, the distance from Frankfort avenue to Sycamore street is 435 feet; on Keats avenue, the distance is 555 feet; on Jane street, the distance is 680 feet, while on Clifton avenue the distance from Frankfort avenue to Sycamore street is 720 feet; on the south the next principal street to Frankfort avenue is Payne street, which is distant 380 feet from Frankfort avenue. The
48 apportionment sued on fixes the taxing district 190 feet on the east side of Frankfort avenue. It is conceded that the south line of the taxing district is properly fixed at 190 feet south of Frankfort avenue, which is one-half the distance to the next principal street on the south; but it is insisted that in fixing the taxing district on the north, it should extend half the distance from Frankfort avenue to Sycamore street, instead of only 190 feet, as has been done.

The precise question here presented, if we are to consider Sycamore street as a principal street, was decided in Cooper *v.* Nevin, 90 Ky., 85, where it was decided that the taxing district should extend back half way to the next principal street, although the depth on one side should be greater than on the other side. In that case the taxing district on the south side of Bank street extended only 210 feet, which was half the distance to St. Xavier street, while on the

north side, the court of appeals fixed the north line of the taxing district at a point 320 feet from Bank street, which was half way from Bank street to Portland avenue, and the next principal street. But it is claimed by the plaintiff, Sycamore street is not a dedicated street of the city of Louisville; that the territory on the north side of Frankfort avenue is not surrounded by principal streets, and is not a square within the meaning of the statute, and that therefore the principle laid down in Cooper *v.* Nevin *supra*, does not control this case. This territory was lately annexed to the city of Louisville. It has been laid off and platted with streets and alleys, as it *not* appears, while it yet remained in the county.

The only evidence as to the dedication of Sycamore street is found in the testimony of Daniel F. Murphy, assessor for the city of Louisville, who says it is so treated by his department, and he files a map which shows Sycamore street to be a regular
49 dedicated street of the city of Louisville. The question of dedication is often a nice one, and difficult of determination. In the case at bar the two eastern squares have been divided into building lots with appropriate streets and alleys and many sales have been made with reference to those public ways. It must be conceded that any abutting property owner has the right to keep these streets and alleys open for public use. It is not primarily a question of dedicated streets. It is rather a question of the existence of a principal street for the purpose of fixing a proper taxing district which will place the burden equitably.

Mr. Murphy says that in fixing this district, the city has never allowed the question of acceptance of a dedication of a street to interfere. In my opinion, that is the proper view of the question; and in considering this question, Sycamore street will be treated as a principal street of the city.

In Cooper *v.* Nevin, 90 Ky., 85, 88, the court said:

"Each sub-division of territory, bounded on all sides by principal streets, is ordinarily deemed a square, and such is the provision of the city charter; still, the territory between the streets may be of such dimensions covering a large area, as would show not only the necessity, but the certainty, that such a-area must at some times be subdivided into squares for public convenience, and, therefore, the city council in ordering the improvement, will only extend the taxing district as far into the territory that is liable to this sub-division as that taxed on the opposite side of the improvement, where the territory has already been defined into squares surrounded by principal streets as contemplated by the charter."

50 The territory, being bounded as principal streets, the charter provision should apply as claimed by defendant, unless the square extending from Frankfort avenue to Sycamore street is "of such dimension as to authorize the conclusion that it was never contemplated that a territory embracing so much land in one square should be deemed a square within the meaning of the law." Nevin *v.* Roach, 86 Ky., 499. This rule is based upon the theory that, in

all probability, the territory will be further cut up by principa streets, thereby making new taxing districts. The ordinary squar is 420 feet long. In the case at bar the three squares range fron 435 feet to 720 feet in depth. In Nevin *v.* Roach, *supra*, the distance from Chestnut to Walnut street was about 744 feet, and it was held not to be so excessive as to violate the rules, while in Dunlap *v* Gosnell, 18 Ky. L. R., 8, the same ruling was held, although in tha case the territory extended about 1,400 feet.

As to the two eastern blocks—from Ewing avenue to Jane street—there can be no reasonable doubt that the charter rule should be applied both on account of this comparatively small excess over an ordinary square, and their present condition as to streets, alleys and varied ownership. Mr. Murphy testified, and it is easily seen from the plat, that it is not probable that any new streets or alleys will ever be laid off in these two eastern blocks. The testimony is otherwise, however, as to the western square bounded by Clifton avenue on the west and Jane street on the east. This block will average about 700 feet in each of its four sides, has no street or alley laid off within its bounds, and only three small lots adjoining each other and fronting on Clifton avenue have been sold. The remainder of the square may be treated as acre property. The supposition, however, that this square will sometime be sub-divided by other principal streets is entirely conjectural, 51 both as to time and the manner of its sub-division. We are not advised as to how many streets may be laid out, or the direction in which they may or will probably run. If there should be one new street laid out, and it should run northwardly and southwardly from Frankfort avenue to Sycamore street, it would in no way affect the correctness of this apportionment, or a similar apportionment for the construction of Sycamore street.

There are no streets abutting against this square, which by an imaginary extension would enable the court to say, with any reasonable probability, that they would hereafter divide this square into a different taxing district, as was the case in Dumesnil *v.* Shanks, 97 Ky., 356, and other similar cases. This doctrine is unsatisfactory at best, both upon principle and in its application; and when viewed in connection with the well settled principle announced in Beck *v.* Obst, 12 Bush, 268, requiring all the property in a square to pay for all the improvements in or to the square, the doctrine is unnecessary. When the fact is well established that any territory is bounded by principal streets, the letter of the charter should control in fixing the taxing district, and when strictly applied as to the construction of these principal streets, as in this case, exact justice is event-ly worked out, since all the property in the two quarter squares pays equally for the construction of the street fronting upon those quarter squares respectively, and any other streets or alleys that may be subsequently laid out within the territory. In applying the rule to this case, I am of opinion that each of these three blocks or squares should be treated independently in fixing the

taxing district. (Cooper *v.* Nevin, 90 Ky., 93.) It does not appear that a different result would be reached by treating them as
52 a continuous tract, or that an unequal proportion of the cost has fallen upon any one square, but it might be different by reason of the irregular course of Frankfort avenue. Each square should bear its own burden only.

In Dumesnil *v.* Shanks, 97 Ky., 358, the court says:

"One of the cardinal and controlling considerations underlying this whole question is based on the idea that the property benefited by the improvement should bear the expense of it, and that the decision in each case must be governed to some extent by the facts of that case."

The plaintiff may have a judgment enforcing its lien, to be apportioned against the property embraced in a taxing district extending back one-half the distance from Frankfort avenue to Sycamore street.

——— ———, *Judge.*

March 15th, 1902.

53 At a court held on the 10th day of April, 1902:

Came the parties by counsel and this action having been heard on plaintiff's motion to set aside the submission herein, and for leave to file its amended petition, and the court being advised, it is ordered that said motion be and is overruled. To which plaintiff excepts.

At a court held on the 14th day of June, 1902:

Came the plaintiff, by counsel, and tendered and moved the court to enter a judgment herein. To which the defendant objects.

Notice being waived, came the defendant by counsel and tendered and moved the court to file an amended answer herein. To which the plaintiff objects.

Ordered that said motions be and are assigned to the 17th inst. for hearing.

At a court held on the 17th day of June, 1902:

Came the defendant by counsel and moved the court to set aside the submission herein, and to file an amended answer which was ordered on the 14th inst. To which the plaintiff objects. And the court being advised, it is ordered that said motion be and is overruled, to which the defendant excepts.

And it is ordered that said amended answer be and is made a part of the record herein for the purpose of appeal.

53a Said amended answer is as follows:

Jefferson Circuit Court, Chancery Division #1.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.
} Amended Answer.

Defendant, The Louisville & Nashville Railroad Company, for amendment to its answer herein, says that plaintiff herein, to-wit: The Barber Asphalt Paving Company, in addition to instituting this suit against this defendant seeking to subject a portion of its right of way to the payment of part of the cost of constructing Frankfort avenue within the limits described in the petition, to-wit: from Cavewood avenue to Raymond avenue, also instituted another suit in the Jefferson circuit court, entitled The Barber Asphalt Paving Company, plaintiff, *v.* William Specht &c., defendants, No. 29263, in which latter suit the said Barber Asphalt Paving Company sought to subject the lands of a large number of persons made defendants therein, more than twenty in number, and owning various parcels of land within the alleged tax limits defined by the ordinance pleaded in the present suit to the payment of part of the cost of improving the same section of Frankfort avenue which is involved and described in this present suit against this defendant, to-wit: the section of Frankfort avenue between Cavewood avenue and Raymond avenue. The ordinance directing the improvement of said Frankfort avenue, and the contract for the improvement of the same, involved in said action of The Barber Asphalt Paving Company *v.* William Specht, &c., were the same ordinance and contract that are involved in this present action against this defendant; and the tax limits within
53b which the property was alleged in the suit of The Barber Asphalt Paving Company *v.* William Specht, &c., to be liable for the payment of the improvement of the aforesaid section of Frankfort avenue were the same as the tax limits described in this present suit as being the limits within which the property is liable for said improvement. But defendant says that since the delivery of the court's opinion in the present suit against this defendant filed herein March 15th, 1902, to the effect that the alleged apportionment of the cost for the improvement of said street was improper and unlawful, the court has adjudged in the said action of The Barber Asphalt Paving Company *v.* William Specht, &c., that the said apportionment which was the same as the apportionment herein involved, was unlawful, and that it is not within the power of the court to order or make a re-apportionment of the said cost of the said improvement of Frankfort avenue between Cavewood avenue and Raymond avenue, and has by its said judgment which was entered

on May 21st, 1902, dismissed the petition therein of said plaintiff The Barber Asphalt Paving Company as against all the defendants therein who were owners of property within the tax limits aforesaid, and has adjudged that the City of Louisville alone is liable to the said Barber Asphalt Paving Company for the cost which had been sought to be apportioned against the properties of said individual owners within said tax limits. Said judgment has never been reversed or set aside, and is still in full force and effect.

Defendant further says that the property described in the petition as amended in said case of Barber Asphalt Paving Company *v.* William Specht, &c., and which was sought therein to be subjected to payment of part of the cost of said improvement, and
53c which the court has adjudged cannot be subjected to the payment of any part of said cost, embraces nearly 240,000 square feet of land, which is largely more than one-third of the entire property embraced within the limits of said tax district as fixed by the said ordinance providing for the improvement of the said section of Frankfort avenue. And defendant says, it having been adjudged that the said lands are not subject, and cannot be subjected, to the payment of any part of the cost of said improvement, it would be unjust and inequitable to subject the property of this defendant, or any other property in said tax district, to the payment of any part of the cost of said improvement. And to do so would be to deprive this defendant of its property without due process of law, and to deny to it the equal protection of the laws, contrary to the provisions of the Constitution of the United States, and especially of the fourteenth amendment thereto.

Wherefore, defendant prays that the petition of plaintiff herein as against this defendant be dismissed.

HELM, BRUCE & HELM,
Att'ys for Def't.

Walker D. Hines says he is the first vice president of the defendant The Louisville & Nashville Railroad Company, and its chief officer now in this State, and he believes the statements of the foregoing amended answer are true.

WALKER D. HINES.

Subscribed and sworn to before me by Walker D. Hines this 14th day of June, 1902. My commission expires January 28th, 1906.

[SEAL.]

G. W. B. OLMSTEAD.
Notary Public.

54 At a court held on the 17th day of June, 1902:

This action having been heard in chief on the pleadings and proof herein, and the court being advised, it is ordered and adjudged:

1. That the territory contiguous to Frankfort avenue and on the north side thereof from Clifton avenue to Ewing avenue is defined into squares by principal streets bounded on the north by Sycamore Ave. and that the law, independent of the ordinance prescribes that the property in the quarter squares contiguous to said improvement is liable for the cost of said improvement.

2. It is adjudged that the apportionment of the cost of said improvement as made by the board of public works is erroneous and the same is set aside and held for naught in so far as the same affects the Louisville and Nashville Railroad Company, and that William W. Crawford is appointed special commissioner to re-apportion the cost of said improvement in accordance with the provisions of this judgment.

3. It is adjudged that in the re-apportionment of the cost of said improvement the commissioner charge the cost of each separate square to the four quarter squares binding thereon, and for that purpose treat the first piece as running from Clifton avenue to Rastetter avenue, extended, the second as running from Rastetter avenue, extended, to Jane street, the third from Jane street to Hupe lane, and Keats street, and the fourth from Hupe lane and Keats street to Raymond avenue and Ewing avenue.

4. It is adjudged that said re-apportionment be made at the cost of the defendant, City of Louisville.

55 At a court held on the 9th day of October, 1902:

Came William W. Crawford, special commissioner, and produced in court his report, which is ordered to be and is now filed and laid over one week for exceptions. And said commissioner also filed a map marked Exhibit B, with said report.

Said report of special commissioner filed on the 9th day of October, 1902, is as follows:

56 Jefferson Circuit Court, Chancery Division, Branch No. 1.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff, *vs.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant.	# 29790. Report of Special Commissioner.

In obedience to a judgment entered herein appointing William W. Crawford a special commissioner to reapportion the cost of improving Frankfort avenue from the center line of Cavewood avenue extended, to the center line of Raymond avenue extended, I wish to make the following report.

Acting under the provisions of the judgment herein, I made a survey of the work done under the contract let by the board of

public works, and divided said contract into four taxing districts in order to apportion the cost of said improvement as provided by law.

The taxing districts are as follows:

1. From the center line of Cavewood avenue, extended, to the center line of Rastetter avenue, extended from the south.

2. From the center line of Rastetter avenue, extended from the south, to a line connecting a point where the northerly curb line of Frankfort avenue intersects the center line of Jane street with a point where the southerly curb line of Frankfort avenue intersects the center line of Burkenmeyer avenue.

3. From a line connecting a point where the northerly curb line of Frankfort avenue intersects center line of Jane street with a point where the southerly curb line of Frankfort avenue intersects the center line of Burkenmeyer avenue to a line connecting a point where the northerly curb line of Frankfort avenue intersects
57 the center line of Keats street with a point where the southerly curb line of Frankfort avenue intersects the center line of Hupe avenue.

4. From a line connecting point where the northerly curb line of Frankfort avenue intersects the center line of Keats street with a point where the southerly curb line of Frankfort avenue intersects the center line of Hupe avenue to the center line of Raymond avenue extended.

In obedience to the judgment, I apportioned the cost of each district to the contiguous quarter squares, treating Rastetter avenue as if extended from the south in order to arrive at the territory liable for the first and second districts as above set out.

The division of quantities used in the following report were obtained by an actual survey in the field, and the use of the city engineer's notes made at the completion of the contract.

The following is a detail report of each individual bill under the re-apportionment, and shows the number of square feet owned by the property owner within the taxing districts, and the amount of material used in each district.

The map filed herewith shows the territory covered by the improvement, and the quarter squares liable are indicated by the red lines.

58 First district.

Frankfort avenue from the center line of Cavewood avenue extended to the center line of Rastetter avenue, extended from the south.

Summary.

1761.2 cubic yards excavation at 26 cents	$457.91
785.3 lineal feet new curbing at 47 cents	369.09
1-24 inch corner stone, at $3.50.	3.50
37.8 lineal feet binder stone, at 45 cents	17.01
1887.6 square yards asphalt paving at $2.00	3775.20
Total taxing district No. 1	$4622.71

Which is apportioned among the following named owners of property according to the number of square feet of ground owned by them respectively within the quarter *square feet of ground owned by them respectively within the quarter* squares contiguous to the improvement.

South west ¼ squares.

John Ewald	Irregular	30063	sq. ft.	$804.48
L. & N. R. R. Co.	"	17965	"	480.74
Lizzie Weissenberger	"	3716	"	99.44
Mary Lenord	"	1208	"	32.33
Total S. W. ¼ square		52952	sq. ft.	$1416.99

South east ¼ square.

John Ewald	Irregular	28000	sq. ft.	749.28
L. & N. R. R. Co.	"	12287	"	328.80
Mary Leonard	"	236	"	6.31
Mary Leonard	"	3070	"	82.34
Theresa Laufer	"	7927	"	212.13
Lizzie Weissenberger	"	1425	"	38.13
Total S. E. ¼ square		52952	sq. ft.	$1416.99

59 North west ¼ square.

Adam Keifer	Irregular	8269	square feet.	$221.27
Jennie T. Conroy	30 x 180.46	5414	"	144.88
Philip, Rose & Chas. Kelly	180 x 46	5414	"	144.88
(Same)	30 x 180.46	5414	"	144.88
John Mayer	30 x 180.46	5414	"	144.88
Elizab. Osewein	Irregular	3497	"	93.58
Totals N. W. ¼ squares		33422	square feet.	$894.37

North east ¼ square.

Elizab. Osewein	Irregular	1918	square feet.	$51.23
Jos. Osewein	"	10788		288.68
Josephine Wigginton	35 x —	6317		169.04
Jos. B. Miller	Irregular	14399		385.31
Totals N. E. ¼ square		33422	square feet.	$894.36

Recapitulation.

South west ¼ square	52952	square feet.	$1416.99
South east ¼ squares	52952	"	1416.99
South west ¼ squares	33422	"	894.37
North east ¼ squares	33422	"	894.36
Total district No. 1	172748	"	$4622.71

Cost per square foot $0.026759846

Second district.

Frankfort avenue from the center line of Rastetter avenue extended from the south to a line connecting a point where the northerly curb line of Frankfort avenue intersects the center lane of Jane street with a point where the southerly line of Frankfort avenue intersects the center line of Burkenmeyer avenue.

Over.

60

Summary.

552.2 cubic yards excavation at 26 cents	$143.57
63.3 cubic yards embankment at 10 cents	6.33
780 lineal feet curbing, at 47 cents	366.60
3–24 inches corner stone, at $3.50	10.50
40.5 lineal feet binder stone, at 45 cents	18.22
1853 square yards asphalt paving at $2.00	3706.00
Totals taxing district No. 1	$4251.22

Which is apportioned among the following named owners of property according to the number of square feet of ground owned by them respectively within the squares contiguous to the improvement.

South west ¼ square.

John Ewald	181.74 x 176.36	32084	square feet.	$677.11
L. & N. R. R. Co.	181.74 x 76	13812	"	291.49
Lizzie Weissenberger	Irregular	3487	"	73.59
Wm. Spect	"	12794	"	270.01
Totals S. W. ¼ square		62177	square feet.	$1312.20

South east ¼ square.

John Edwald	174.26 x 176.536	30763	square feet.	$649.23
L. and N. R. R. Co.	174.26 x 76	14003	"	295.52
Wm. Spect	Irregular	6524	"	137.69
Carrie Kessack	"	10887	"	229 76
Totals S. E. ¼ square		62177	square feet.	$1312.20

North west ¼ square.

Wilhelmina Hiller	Irregular	10665	square feet.	$225.0
Carolina Leonhard	"	5762	"	121.6
Jno. Reiner	"	11818	"	249.4
Henrietta Marx	"	6013	"	126.9
Chas. Fust	"	4050	"	85.4
Totals N. W. ¼ square		38308	square feet.	$808.4

61

North east ¼ square.

Chas. Fust	Irregular	1000	square feet.	$21.1
Owen McCann	"	6107	"	128.8
Wilhelmina Messer	"	6158	"	129.9
Nelly A. Kenny	"	6210	"	131.0
Jas. H. Tinsley	"	5842	"	123.2
Jas. H. Tinsley	"	5676	"	119.7
J. H. G. Wallbaum	"	7784	"	164.2
Totals N. E. ¼ square		38777	square feet.	$818.3

Recapitulation.

South west ¼ squares	62177	square feet.	$1312.2
South east ¼ squares	62177	"	1312.2
North west ¼ squares	38308	"	808.4
North east ¼ squares	38777	"	818.3
Totals taxing district No. 2	201439	square feet.	$4251.22

Cost per square foot, $0.021104254

Third district.

Frankfort avenue from a line connecting a point where the northerly curb line of Frankfort avenue intersects the center line of Jane street with a point where the southerly curb line of Frankfort avenue intersects the center line of Burkenmeyer avenue to a line connecting a point where the northern curb line of Frankfort avenue intersects the center line of Keats street with a point where the southerly curb line of Frankfort avenue intersects the center line of Hupe avenue.

Summary.

1790 cubic yards excavation, at 26 cents	$465.40
3.6 cubic yards embankment, at 10 cents	.36
819.8 lineal feet curbing, at 47 cents	385.31
4–24 inch corner stones, at $3.50	14.00
49 lineal feet binder stone, at 45 cents	22.05
1935.9 square yards asphalt paving at $2.00	3871.80
Totals taxing district No. 3	$4758.92

62 Which is apportioned among the following named owners of property according to the number of square feet of ground owned by them respectively within the quarter squares contiguous to the improvement.

South west ¼ square.

Thos. J. Fitzgerald	31.32 x 200	6264	square feet.	$157.20
Ellen Hyde	50 x 200	10000	"	250.95
Christopher Bader	50 x 200	10000	"	250.95
L. & N. R. R. Co.	224.89 x 66	14834	"	372.49
Wm. Spect	Irregular	19871	"	498.66
Margaretha Widman	"	1384	"	34.73
Totals S. W. ¼ square		62362	square feet.	$1564.98

South east ¼ square.

Chas. F. McCaffrey	Irregular	4480	square feet.	$112.43
Constant Georgel	"	6213	"	155.92
Sallie M. Woodsmall	"	10550	"	264.75
Mrs. J. E. Speed	"	6446	"	161.77
L. & N. R. R. Co	"	16616	"	416.98
Margaretha Widman	"	19206	"	481.98
Totals S. E. ¼ square		61511	square feet.	$1593.82

North west ¼ square.

Herman Kraus	Irregular	21957	square feet.	$551.02
Herman Kraus	"	9105	"	228.49
G. F. & T. P. Raymond	"	770	"	19.32
Wm. Mueller	.92 x 180	16	"	.40
Totals N. W. ¼ square		31848	square feet.	$799.23

North east ¼ square.

G. F. & T. P. Raymond	163.658 x 15	2455	square feet.	$61.61
Wm. Muller	49.908 x 180	8984	"	225.46
Harry R. Whitesides	113.75 x 180	20475	"	513.82
Totals N. E. ¼ square		31914	square feet.	$800.89

63 *Recapitulation.*

South west ¼ squares	62362	square feet.	$1564.98
South east ¼ square	63511	"	1593.82
North west ¼ square	31848	"	799.23
North east ¼ square	31914	"	800.89
Totals taxing district No. 3	189635	square feet.	$4758.92

Cost per square foot, $0.025095156.

Fourth district.

Frankfort avenue from a line connecting a point where the northerly curb line of Frankfort avenue intersects the center line of Keats street with a point where the southerly curb line of Frankfort avenue intersects the center line of Hupe avenue to the center line of Raymond avenue extended.

Summary.

2829.2 cubic yards excavation, at 26 cents	$735.59
1089.6 lineal feet curbing, at 47 cents	512.11
3–24 inch corner stones, at $3.50	10.50
43 lineal feet binder stone, at 45 cents	19.35
2529.8 square yards asphalt paving at $2.00	5059.60
Totals taxing district No. 4	$6337.15

Which is the apportionment among the following named owners of property according to the number of square feet of ground owned by them respectively within the quarter squares contiguous to the improvement.

South west ¼ squares.

Jennie Ewing Speed	Irregular	3571 square feet.	$106.93
J. H. Thompson	"	4635 "	138.78
Sallie C. Murphy	"	9627 "	288.26
Louis Behren	"	8045 "	240.89
L. and N. R. R. Co.	"	15671 "	469.24
Louis Behren	"	2476 "	74.13
Frank Bauber	"	8644 "	258.83
Totals S. W. ¼ square		52669 square feet.	$1577.06

64

South east ¼ square.

Thos. E. Fagan	Irregular	1678 square feet.	$50.24
Thos. E. Fagan	50 x 194.76	9938 "	291.58
J. T. Davis	75 x 194.76	14607 "	437.38
L. and N. R. R. Co.	Irregular	17415 "	521.46
Frank Bauber	"	1971 "	59.02
Louis Behrens	"	2137 "	63.99
Jennie Ewing Speed	"	344 "	10.30
J. H. Thompson	24.88 x 17.57	437 "	13.08
Sallie C. Murphy	49.76 x 17.57	874 "	26.17
Louis Behrens	39.81 x 17.57	699 "	20.93
Totals S. E. ¼ square		49900 square feet.	$1494.15

North west ¼ square.

G. F. & T. P. Raymond	Irregular	2339	square feet.	$70.04
G. F. & T. P. Raymond	70.296 x 15	1054	"	31.56
Constant Georgel	Irregular.	10733	"	321.38
Maggie Reiter	25 x 180	4500	"	134.74
Mary Reiter	25 x 180	4500	"	134.74
Chas. Heigold	50 x 180	9000	"	269.49
Lena Zehnder	50 x 195	9750	"	291.94
Hy. A. Kiefer	50 x 180	9000	"	269.49
Frank A. Thoman	20.269 x 180	3653	"	109.38
Totals north west ¼ square		54529	square feet.	$1632.76

North east ¼ square.

Frank A. Thoman	79.704 x 180	14347	square feet.	$429.59
Geo. Hobbs	25 x 180	4500	"	134.74
Jno. M. Schoen	25 x 180	4500	"	134.74
Lucy J. Nuchols	100 x 180	18000	"	538.98
Lucy J. Nuchols	50 x 180	9000	"	269.49
G. F. & T. P. Raymond	279.704 x 15	4196	"	125.64
Totals north east ¼ square		54543	square feet.	$1633.18

65 *Recapitulation.*

South west ¼ square	52669	square feet.	$1577.06
South east ¼ square	49900	"	1494.15
North west ¼ square	54529	"	1632.76
North east ¼ square	54543	"	1633.18
Totals taxing district No. 4	211641	square feet.	$6337.15

Cost per square foot, $0.029942922.

Grand Recapitulation.

Taxing district No. 1	172748	square feet.	$4622.71
Taxing district No. 2	201439	"	4251.22
Taxing district No. 3	189635	"	4758.92
Taxing district No. 4	211641	"	6337.15
Totals	775453	square feet.	$19970.00

I file herewith as part hereof a copy of the judgment ordering the re-apportionment, and appointing me special commissioner to make the same, marked Exhibit "A." I also file a map showing the re-apportionment as made under the orders herein, marked Exhibit "B."

I respectfully ask the court to allow me one hundred and fifty (150) dollars for my service herein as special commissioner, to be paid by the City of Louisville in accordance with the terms of the judgment.

All of which is respectfully submitted.

WILLIAM W. CRAWFORD.
Special Commissioner.

66 Exhibit filed with the foregoing report is as follows:

"EXHIBT H."

STATE OF KENTUCKY, }
County of Jefferson. }

Jefferson Circuit Court, Chancery Branch, Division No. 1.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
L. & N. R. R. COMPANY, Defendant. } # 29790. Judgment

At a court held on the 17th day of June, 1902.

This action having been heard in chief on the pleadings and proof herein, and the court being advised, it is ordered and adjudged:

1. That the territory contiguous to Frankfort avenue and on the north side thereof from Clifton avenue to Ewing avenue is defined into squares by principal streets bounded on the north by Sycamore avenue, and that the law, independent of the ordinance, prescribes that the property in the quarter squares contiguous to said improvement is liable for the cost of said improvement.

2. It is adjudged that the apportionment of the costs of said improvement as made by the board of public works is erroneous, and that the same is set aside and held for naught in so far as the same affects the Louisville & Nashville Railroad Company, and that William W. Crawford is appointed special commissioner to re-apportion the cost of said improvement in accordance with the provisions of this judgment.

3. It is adjudged that in the re-apportionment of the cost of said improvement the commissioner charge the costs of each separate square to the four quarter squares binding thereon, and for that purpose treat the first piece as running from Clifton avenue to Rastetter avenue extended, the second as running from Rastetter avenue extended, to Jane street, the third from Jane street to Hupe lane, and Keats street, and the fourth from Hupe lane and Keats street to Raymond avenue and Ewing avenue.

4. It is adjudged that the re-apportionment be made at the cost of the defendant, City of Louisville.

A copy.
Attest:

JOHN H. PAGE, *Clerk*,
By KATIE NOLAND, *D. C.*

67 Jefferson Circuit Court, Chancery Division, Branch No. 1.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant.
29790. Oath of Special Commissioner.

The affiant, William W. Crawford, being duly sworn, says, that he will perform the duties of special commissioner in the above styled action under the orders thereof to the best of his ability, impartially and honestly.

WILLIAM W. CRAWFORD.

Subscribed and sworn to before me this 4th day of October, 1902, by William W. Crawford.

My commission expires on the 27th day of Jan., 1904.

R. N. KRIEGER,
Notary Public, Jefferson County.

68 At a court held on the 16th day of October, 1902:

On motion of Wm. *M.* Crawford, the report of the special commissioner herein having lain over one week and no exceptions having been filed thereto, it is ordered that the same be and is hereby confirmed in each and every particular.

And the special commissioner is allowed the sum of one hundred and fifty dollars for his services herein, to be paid by the city of Louisville, and taxed as costs.

At a court held on the 13th day of December, 1902:

This action was set at rules by the plaintiff on the 8th inst.

Came the defendant, City of Louisville, by counsel, and filed his answer herein.

And on motion of plaintiff, by counsel, it is ordered that this action be and is remanded to the rules.

Said answer of the City of Louisville filed on the 13th day of December, 1902, is as follows:

Jefferson Circuit Court, Chancery Branch, 1st Division.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD Company and City of Louisville, Defendants.

Answer of City of Louisville.

69 1st. par. The defendant, City of Louisville, for answer plaintiff's petition herein denies that by the contract fil with plaintiff's amended petition October 12, 1901, and sued herein, this defendant bound or obligated itself that plaintiff shou be paid for the work mentioned therein, or any part thereof, at t rates or prices therein named, or any rate or price, by this defen ant.

2nd par. This defendant for further answer herein, states that the express terms of the contract for the improvement of the ca riage way of that part of Frankfort avenue from the center line Cavewood avenue extended to the center line of Raymond avenu extended, dated July 3, 1900, sued on by plaintiff herein, as d scribed in plaintiff's petition, it was agreed and provided by th plaintiff as contractor for said work, that for the contract price cost of all work mentioned in said contract or required to be don by it under any of the provisions of said contract, the plaintiff woul look alone to the lot owners or the property described in the ord nance referred to in said contract, or in plaintiff's petition, and th plaintiff further covenanted and agreed by the terms of said con tract that it in no event should be entitled to recover any part said contract price or cost from this defendant. A certified cop of said contract is filed with plaintiff's amended petition as afore said and is referred to as part hereof. This defendant states tha under said provisions of said contract this defendant is not liabl for any part of the cost of the work mentioned in plaintiff's pet tion and plaintiff is bound to look alone to the lot owners or th property described in said ordinance according to the apportion ment of the cost aforesaid for the amount of the contract price fo said improvement or the cost thereof, and is not entitled to recove any part of the same from this defendant in any event.

70 Wherefore this defendant prays hence to be dismissed with its costs, and for all other relief to which it in equity may ap pear to be entitled.

H. L. STONE,
City Attorney.

At a court held on the 16th day of May, 1903:

This action was set at rules by the plaintiff on the 11th inst.

On motion of plaintiff, by counsel, it is ordered that this action be and is submitted.

At a court held on the 20th day of June, 1903:

71 This action having been submitted on pleadings and exhibits, and the court being advised, it is now considered and adjudged that the plaintiff, the Barber Asphalt Paving Company, has a prior and superior lien on the lots of land hereinafter described belonging to the defendant, Louisville & Nashville Railroad Company, to secure the amounts hereinafter set forth.

1. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville & Nashville Railroad Company, and bounded and described as follows: Beginning at the intersection of the center line of Clifton avenue with the north line of the right of way of the Louisville & Nashville railroad, running thence eastwardly along the north line of said right of way 257.12 feet, thence at right angles with said north line of said right of way 66 feet to the south line of said right of way, thence at right angles to said last mentioned line and with the southern line of said right of way 287.28 feet to the center line of Clifton avenue, thence with the center line of Clifton avenue northwardly to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien upon the said lot to secure the sum of $480.74 with interest from October 16, 1902, and $— said lot's proper proportion of the cost of this action.

2. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning at a point marking the northeastern corner of the track described and marked No. 1, running thence with the northern line of the right of way of the Louisville — Nashville railroad 174.66 feet,

72 thence at right angles with the last mentioned line northwardly 10 feet, thence at right angles with the last mentioned line eastwardly 10 feet, thence at right angles with the last mentioned line southwardly 76 feet to the south line of the right of way of the Louisville & Nashville railroad, thence with the said south line of the said right of way westwardly 184.66 feet to the eastern line of the tract above described as No. 1, thence with said eastern line to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on the lot of land to secure the sum of $328.80 with interest from October 16, 1902, and $— said lot's proper proportion of the cost of this action.

3. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning in the north line of the right of way of the Louisville & Nashville railroad at a point common to the northeast corner of the lot above described as No. 2, running thence with said north line of the said right of way eastwardly 181.74 feet, thence at right angles to the last mentioned line southwardly 76 feet to the south line of the right of way of the Louisville and Nashville railroad, thence with said south line of the said right of way westwardly 181.74 feet,

thence at right angles to the said southern line of said right of way and northwardly to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on said lot of land to secure the sum of $291.49 with interest from October 16, 1902, and $— said lot's proper proportion of the cost of this action.

4. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville &
73 Nashville Railroad Company, and bounded and described as follows: Beginning in the northern line of the right of way of the Louisville and Nashville railroad at a point common to the northeastern corner of the tract above described as No. 3, running thence with the said northern line of said right of way eastwardly 174.26 feet to the center line of Jane street, thence with said center line of Jane street south 76 feet to the southern line of the right of way of the Louisville and Nashville road, thence with said southern line of said right of way and at right angles to Jane street westwardly 174.26 feet, thence at right angles to said south line of said right of way northwardly 76 feet to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on the said lot of land to secure the sum of $295.52 with interest from Oct. 16, 1902, and $—, said lot's proper proportion of the cost of this action.

5. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning at a point where the center line of Jane street intersects the northern line of the right of way of the Louisville and Nashville railroad, thence with said northern line of said right of way eastwardly 224.89 feet, thence at right angles to said northern line of said right of way southwardly 66 feet to the south line of the right of way of the Louisville & Nashville railroad, thence with said south line of said right of way westwardly 224.89 feet, thence at right angles to said south line of said right of way northwardly 66 feet to the point of beginning. It is adjudged that plaintiff has a prior and superior lien on said lot of land to secure the sum
74 of $372.49 with interest from October 16, 1902, and —, said lot's proper portion of the cost of this action.

6. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning in the north line of the right of way of the Louisville and Nashville railroad at a point common to the northeast corner of the lot above described as No. 5, running thence with the north line of the said right of way westwardly 218.31 feet to the center line of Keats avenue, thence with said center line of Keats avenue southwardly to the south line of the right of way of the Louisville and Nashville railroad, thence with said south line of said right of way westwardly 229.89 feet to the east line of the tract herein described as No. 5, thence with said line northwardly 66 feet to the point of beginning. It is adjudged that plaintiff has a prior and

superior lien on said lot of land to secure the sum of $416.98 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

7. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning at a point where the center point of Keats avenue intersects the north line of the right of way of the Louisville and Nashville railroad, running thence with said north line of said right of way eastwardly 259.03 feet, thence southwardly with a line parallel to Ewing avenue to the south line of the right of way of the Louisville and Nashville railroad, thence with said south line of said right of way westwardly 271.74 feet to the center line of Keats avenue, thence with the center line of Keats avenue northwardly to the point
75 of beginning. It is adjudged that plaintiff has a prior and superior lien on said lot of land to secure the sum of $469.24 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

8. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville & Nashville Railroad Company, and bounded and described as follows: Beginning at a point where the center line of Ewing avenue intersects the north line of the right of way of the Louisville and Nashville railroad, running thence with the north line of the said right of way westwardly 235.93 feet, thence southwardly with a line parallel to said center line of Ewing avenue to the south line of the right of way of the Louisville & Nashville railroad, thence with said south line of the said right of way eastwardly 225.93 feet, to the center line of Ewing avenue northwardly to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on said lot to secure the sum of $521.46 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

It is further considered and adjudged that each of the lots above described is indivisible without materially impairing the value of such lots, and each of said lots will therefore be sold as a whole.

For the purpose of satisfying the lien held by plaintiff against the lots of land above described as hereinbefore set forth it is adjudged that each of the above pieces of property shall be sold, and the commissioner of this court is hereby ordered and directed to sell at public auction each of the lots aforesaid. The said sale shall shall occur on some Monday at or about the hour of 11
76 o'clock a. m. at the court house door of the court house in Jefferson county, Kentucky.

Before making the sale herein directed, the commissioner will advertise the same by printed hand bills setting forth the time, place, and terms of sale, to be posted one at the court house door, and one on or near the premises herein offered to be sold; said bills to be posted for at least ten days prior to the day of sale. In addi-

tion the commissioner shall advertise said sale by a brief noti published in the Louisville Courier Journal for four days, includi Sunday, next preceding the day of sale, setting forth the time, pla and terms of sales herein ordered to be made.

Each of the lots of land herein described shall be sold separatel and each of said sales shall be made on a credit of six and twel months, the purchaser to execute bonds with good surety bearir interest from the day of sale until paid; a lien shall be retained o the property sold as additional security. The purchaser of each l will be required to make a cash deposit of $25.00 at the time of th acceptance of his bid in order to insure compliance therewith.

The property sold herein will be conveyed to the purchaser su ject to all taxes that may be held against it by the city, county an State, and all sales will be made subject to such tax lien, if an exist.

At a court held on the 30th day of July, 1903:

Came the defendant Louisville & Nashville Railroad Company by counsel and prayed an appeal to the court of appeals from th judgment entered on June, 1903, which appeal is hereby granted.

77 And on the 4th day of August, 1903, the following super sedeas bond was filed in the clerk's office:

COMMONWEALTH OF KENTUCKY,
Jefferson County.

Jefferson Circuit Court, Chancery Branch, First Division.

LOUISVILLE & NASHVILLE RAILROAD CO., Appellant,
against
BARBER ASPHALT PAVING CO. & CITY OF LOUISVILLE, Appellees.

Appeal from a judgment of this court rendered the 20th day of June, 1903.

Whereas said appellant has taken an appeal from the judgment of this court rendered on the 20th day of June, 1903, against Louisville & Nashville Railroad Company in favor of appellees Barber Asphalt Paving Company and City of Louisville for adjudging superior lien on certain lots of land mentioned and described in judgment to secure certain sums of money amounting to about $3,176.72 with interest and costs and adjudging sale of them, which judgment is in words and figures as follows:

Over.

78 This action having been submitted on pleadings and exhibits, and the court being advised, it is now considered and adjudged that the plaintiff, The Barber Asphalt Paving Company,

has a prior and superior lien on the lots of land hereinafter described belonging to the defendant, Louisville & Nashville Railroad Company, to secure the amounts hereinafter set forth.

1. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville & Nashville Railroad Company, and bounded and described as follows: Beginning at the intersection of the center line of Clifton avenue with the north line of the right of way of the Louisville & Nashville railroad, running thence eastwardly along the north line of said right of way 257.12 feet, thence at right angles with said north line of said right of way 66 feet to the south line of said right of way, thence at right angles to said last mentioned line and with the southern line of said right of way 287.28 feet to the center line of Clifton avenue, thence with the center line of Clifton avenue northwardly to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien upon the said lot to secure the sum of $480.74 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

2. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning at a point marking the northeastern corner of the track described and marked No. 1, running thence with the northern line of the right of way of the Louisville — Nashville railroad 174.66 feet, thence at right angles with the last mentioned line north-
79 wardly 10 feet, thence at right angles with the last mentioned line eastwardly 10 feet, thence at right angles with the last mentioned line southwardly 76 feet to the south line of the right of way of the Louisville & Nashville railroad, thence with the said south line of the said right of way westwardly 184.66 feet to the eastern line of the tract above described as No. 1, thence with said eastern line to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on the lot of land to secure the sum of $328.80 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

3. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning in the north line of the right of way of the Louisville & Nashville railroad at a point common to the northeast corner of the lot above described as No. 2, running thence with said north line of the said right of way eastwardly 181.74 feet, thence at right angles to the last mentioned line southwardly 76 feet to the south line of the right of way of the Louisville and Nashville railroad, thence with the said south line of the said right of way westwardly 181.74 feet, thence at right angles to the said southern line of said right of way and northwardly to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on said lot of land to

secure the sum of $291.49 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

4. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville &
80 Nashville Railroad Company, and bounded and described as follows: Beginning in the northern line of the right of way of the Louisville and Nashville railroad at a point common to the northeastern corner of the tract above described as No. 3, running thence with the said northern line of the said right of way eastwardly 174.26 feet to the center line of Jane street, thence with said center line of Jane street, south 76 feet to the southern line of the right of way of the Louisville and Nashville road, thence with said southern line of said right of way and at right angles to Jane street westwardly 174.26 feet, thence at right angles to said south line of said right of way northwardly 76 feet to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on the said lot of land to secure the sum of $295.52 with interest from Oct. 16, 1902, and $—, said lot's proper proportion of the cost of this action.

5. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning at a point where the center line of Jane street intersects the northern line of the right of way of the Louisville and Nashville railroad, thence with said northern line of said right of way eastwardly 224.89 feet, thence at right angles to said northern line of said right of way southwardly 66 feet to the south line of the right of way of the Louisville & Nashville railroad, thence with said south line of said right of way westwardly 224.89 feet, thence at right angles to said south line of said right of way northwardly 66 feet to the point of beginning. It is adjudged that plaintiff has
a prior and superior lien on said lot of land to secure the
81 sum of $372.48 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

6. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning in the north line of the right of way of the Louisville and Nashville railroad at a point common to the northeast corner of the lot above described as No. 5, running thence with the north line of the said right of way westwardly 218.31 feet to the center line of Keats avenue, thence with said center line of Keats avenue southwardly to the south line of the right of way of the Louisville and Nashville railroad, thence with said south line of said right of way westwardly 229.89 feet to the east line of the tract herein described as No. 5, thence with said line northwardly 66 feet to the point of beginning. It is adjudged that plaintiff has a prior and superior lien on said lot of land to secure the sum of $416.98 with

interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

7. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville and Nashville Railroad Company, and bounded and described as follows: Beginning at a point where the center line of Keats avenue intersects the north line of the right of way of the Louisville and Nashville railroad, running thence with said north line of said right of way eastwardly 259.03 feet, thence southwardly with a line parallel to Ewing avenue to the south line of the right of way of the Louisville and Nashville railroad, thence with said south line of said right of way westwardly 271.74 feet to the center line of Keats avenue, thence with the center line of Keats avenue northwardly to the point of beginning. It is adjudged that plaintiff has a prior and superior lien on said lot of land to secure the sum of $469.24 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

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8. A lot of land in Louisville, Jefferson county, Kentucky, consisting of a portion of the right of way of the Louisville & Nashville Railroad Company, and bounded and described as follows: Beginning at a point where the center line of Ewing avenue intersects the north line of the right of way of the Louisville and Nashville railroad, running thence with the north line of the said right of way westwardly 235.93 feet, thence southwardly with a line parallel to said center line of Ewing avenue to the south line of the right of way of the Louisville & Nashville railroad, thence with said south line of the said right of way eastwardly 225.93 feet, to the center line of Ewing avenue northwardly to the point of beginning. It is adjudged that the plaintiff has a prior and superior lien on said lot to secure the sum of $521.46 with interest from October 16, 1902, and $—, said lot's proper proportion of the cost of this action.

It is further considered and adjudged that each of the lots above described is indivisible without materially impairing the value of such lots, and each of said lots will therefore be sold as a whole.

For the purpose of satisfying the lien held by plaintiff against the lots of land above described as hereinbefore set forth it is adjudged that each of the above pieces of property shall be sold, and the commissioner of this court is hereby ordered and directed to sell at public auction each of the lots aforesaid. The said sale shall occur on some Monday at or about the hour of 11 o'clock a. m. at the court house door of the court house in Jefferson county, Kentucky.

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Before making the sale herein directed, the commissioner will advertise the same by printed hand bills, setting forth the time, place, and terms of sale, to be posted one at the court house door, and one on or near the premises herein ordered to be sold: said bills to be posted for at least ten days prior to the day of sale. In addition, the commissioner shall advertise said sale by a brief notice published in the Louisville Courier Journal for 4 days, including

Sunday, next preceding the day of sale, setting forth the time, pl
and terms of sales herein ordered to be made.

Each of the lots of land herein described shall be sold separat
and each of said sales shall be made on a credit of six and twe
months, the purchaser to execute bonds with good surety, bear
interest from the day of sale until paid; a lien shall be retained
the property sold as additional security. The purchaser of each
will be required to make a cash deposit of $25.00 at the time of
acceptance of his bid, in order to insure compliance therewith.

The property sold herein will be conveyed by the purchaser s
ject to all taxes that may be held against it by the city, county a
State, and all sales will be made subject to such tax lien, if any ex
and the appellant desires to supersede said judgment.

Now we, Louisville and Nashville Railroad Company, princip
do hereby covenant to and with the appellees, Barber Asphalt Pa
ing Company and City of Louisville, that the appellant will pay
the appellees all costs and damages that shall be adjudged agai
the appellant on the appeal, and also that they will satisfy and p
form the said judgment in case it shall be affirmed, and a
84 judgment or order which the court of appeals of Kentuc
may render, or order to be rendered by the inferior cou
not exceeding in amount or value the judgment aforesaid, and al
pay all rents, hire or damage which during the pendency of t
appeal, may accrue on any part of the property of which the app
lees are kept out of possession by reason of the appeal.

Witness our hands this 4th day of August, 1903.

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY, [SEAL.]
By HELM, BRUCE & HELM, *Att'y-*. [SEAL.]
ATILLA COX, [SEAL.]
By HELM BRUCE, *Att'y in Fact.* [SEAL.]

Attest: JNO. H. PAGE, *Clerk.*

BARBER ASPHALT PAVING CO.
vs.
LOUIS. & NASH. R. R. CO.

Whereas, the Barber Asphalt Paving Company has lately reco
ered a judgment for about $3,200.00 and interest in the case
Barber Asphalt Paving Company, plaintiff, *v.* Louisville & Nas
ville Railroad Company, &c., defendants, in the circuit court
Jefferson county, Kentucky, and said Louisville and Nashvil
Railroad Company has prayed an appeal from said judgment to th
court of appeals of Kentucky,

I, Atilla Cox, of the county of Jefferson and State of Kentucky
hereby appoint and constitute Helm Bruce, Esq., of Louisvill
Jefferson county, Kentucky, my true and lawful attorney in fact t

execute for me and in my name the necessary appeal and
85 supersedeas bond as surety for said company pending said appeal.

This 31st day of July, 1903.

ATILLA COX.

Witness:

L. W. BOTTS.

And thereupon the clerk issued supersedeas and copy, which said supersedeas is as follows:

STATE OF KENTUCKY,
Jefferson County.

Jefferson Circuit Court.

BARBER ASPHALT PAVING CO. and CITY of Louisville, Appellees,
versus
LOUISVILLE AND NASHVILLE RAILROAD Co., Appellant.
} Supersedeas. # 28790.

I, John H. Page, clerk of the Jefferson circuit court, in the county and State aforesaid, do hereby certify that an appeal has been granted *from* this court from a judgment obtained by Barber Asphalt Paving Company and City of Louisville against Louisville and Nashville Railroad Company adjudging superior liens on certain lots of land mentioned and described in said judgment to secure certain sums of money amounting to about $3,176.72 and interest and costs and adjudging sale of said lots, in the Jefferson circuit court, chancery branch, first division, on the 20th day of June, 1903, and that a supersedeas bond has been executed after the appeal was granted. Therefore, the appellees and all others are commanded to stay proceedings on the judgment aforesaid.

86 Witness, John H. Page, clerk of said court, this 4th day of August, 1903.

JOHN H. PAGE, *Clerk.*

Sheriff's return on foregoing supersedeas is as follows:

Came to hand Aug. 5th, 1903, at 12:30 p. m.
Executed Aug. 5/1903 on City of Louisville by delivering a copy of the within supersedeas to Charles F. Grainger, mayor of said city.

E. T. SCHMITT, *S. J. C.*,
By W. B. THIXTON, *D. S.*

Executed Aug. 5, 1903, on the Barber Asphalt Paving Co. by d
livering a copy of the within supersedeas to Wm. Furlong, attorn
for said Barber Asphalt Paving Company, and he accepting servi
See acceptance hereon.

E. T. SCHMITT, *S. J. C.*,
By JNO. TARLTON, *D. S.*

Service accepted Aug. 5th, 1903.

THE BARBER ASPHALT PAVING CO.,
By WM. FURLONG, *Att'y.*

87 Jefferson Circuit Court, Chancery Division.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD CO., Defendant. } No. 2927

The deposition of D. F. Murphy, taken by agreement, before m
on the 30th day of January, 1902, at the office of Messrs. Heln
Bruce & Helm, in the Louisville Trust Company building, Loui
ville, Ky., to be read in evidence on behalf of defendant in abov
styled case.

D. F. MURPHY, being duly sworn and examined by Mr. Bruc
deposed as follows:

1. Mr. Murphy, you are the assessor of the city of Louisville, a
you not?

A. I am.

2. And have been such for many years?

A. Yes, sir.

3. Do you not keep in your office as a part of the public records
the city of Louisville, plats showing the location of streets an
highways, and of the divisions of blocks of property into lots?

A. I have such maps in my office.

4. I will ask you if you have in your office plat showing the loc
tions of streets north of Frankfort avenue from Clifton avenue o
the west to Ewing avenue on the east, and the divisions of the block
of property between those streets?

A. I have.

5. Have you at my request made a copy of the plats in you
office showing the property referred to in my preceding que
tion?

88 A. I have.

6. If you have such a plat with you, please file it wit
your deposition and make it a part hereof, and state whether or n
it is a correct copy?

A. This is the plat made showing the property and streets in th
district specified. I file it as a part of my deposition, marked "E
hibit A."

7. What is the first principal street in the city of Louisville north of Frankfort avenue between Clifton avenue on the west and Ewing avenue on the east?

A. Sycamore street.

8. What is the width of that street?

A. Fifty feet in width.

9. What street-, if any, are there between Clifton avenue and Ewing avenue?

A. Jane street and Keats street.

10. What are the widths of those streets?

A. Jane street is forty feet wide; Keats street fifty feet wide.

11. Does this plat which you have filed with your deposition correctly show the locations and widths of streets in the territory mentioned, and the divisions of blocks into lots?

A. It does.

12. And correctly show the locations and widths of alleys in the territory?

A. It does.

13. Mr. Murphy, state whether or not in your judgment, there is any probability of the blocks bounded on the north by
89 Sycamore street, on the south by Frankfort avenue, on the west by Keats street, and on the east by Ewing avenue, ever being divided up, by the running of another street between Frankfort avenue and Sycamore street?

A. I do not think that any street will ever be run through the block specified other than those that are now there.

14. Please answer the same question as to the block bounded on the north by Sycamore street, on the south by Frankfort avenue, on the west by Jane street, and on the east by Keats street?

A. I do not think that there will ever be any other street running through that block.

15. Please answer the same question as to the block bounded on the north by Sycamore street, on the south by Frankfort avenue, on the east by Clifton street, and on the west by Jane street.

A. I think it is probable that the block will be divided by other streets.

16. Do you know of any present purpose or intention to thus divide the block?

A. I do not.

17. State whether or not there is a principal street south of Frankfort avenue, and practically parallel with it, between Cavewood street on the west and Raymond avenue on the east; if so, what that street is?

A. There is such a street running practically parallel with Frankfort avenue between the points specified, and that street is known as Payne street.

18. What is the difference between Frankfort avenue and Payne street, if you remember?

A. I do not remember the difference but it is about the ordinary distance between streets in the city of Louisville.

90 19. How do Clifton street to the north of Frankfort avenue and Cavewood avenue to the south of Frankfort avenue, intersect Frankfort avenue with reference to each other?

A. Well, the intersection is made without any regard to each other at all—some distance apart.

20. Does Clifton avenue run south of Frankfort avenue?

A. No; it does not run south of Frankfort avenue.

21. Does Cavewood avenue run north of Frankfort avenue?

A. It does not.

22. Well, do not Cavewood avenue from the south of Clifton avenue from the north intersect Frankfort avenue a very short distance apart?

A. Yes; some little distance apart.

23. Cavewood avenue being slightly to the west of Clifton avenue?

A. Yes.

24. Can you state approximately the relations of Raymond avenue on the south, and Ewing avenue on the north of Frankfort avenue, as to their intersections with Frankfort avenue?

A. They are almost opposite each other.

Cross-examined by Mr. FURLONG:

25. Mr. Murphy, you have been speaking of squares north of Frankfort avenue, bounded by Keats avenue and Ewing avenue, contiguous to Frankfort avenue. What is a square or block according to your idea?

A. I regard the squares or blocks between Ewing avenue, Keats avenue, Frankfort avenue and Sycamore street as being about an ordinary block in point of size.

26. What I mean is, what is necessary to constitute a block—must it not be surrounded by four streets?

A. By four streets.

91 27. Is the block betwoen Ewing and Keats, Frankfort and Sycamore so bounded by streets?

A. Yes.

28. You say it is?

A. I do.

29. Isn't it a fact that the Louisville and Nashville Railroad Company owns a right of way the whole length of this territory?

A. It is.

30. Is there a public street across their right of way?

A. No; the street is not dedicated across their right of way. Their right of way runs through this block that I specified.

31. It shuts off or breaks at Keats avenue, doesn't it?

A. Keats avenue is dedicated from Frankfort avenue northwardly to the line of the Louisville and Nashville Railroad Company, and across the line of the railroad company it is not dedicated. It be-

gins again on the north side of the railroad company and continues on through by dedication to the next street, Sycamore street.

32. That is also true of Ewing avenue and Jane street, is it not?

A. It is.

33. So those two squares or blocks are not bounded their whole length on each side by principal streets, are they?

A. Yes; I regard them as being bound by four principal streets with the exception that I stated before—that the railroad company runs through the block and cuts off the dedication so far as the width of the railroad company is concerned.

34. Then across the line occupied by the railroad company's
92 right of way, there is no Jane street or Keats avenue or Ewing avenue, is there?

A. No; it is not dedicated across the railroad company's right of way—neither of the streets are dedicated across it.

35. And for the length of the width of that right of way, those blocks are not bound by a principal street, are they?

A. I have to answer that as I did before—that I regard those two blocks as being bound by streets with the exception that the streets, so far as the right of way of the railroad company is concerned, is not dedicated.

36. That being true that the streets are not dedicated across that strip of ground, there is no street along there, is there?

Question objected to on the ground that the witness has fully answered it two or three times, and has stated the facts exactly as they exist.

A. Jane street does not cross the Louisville and Nashville Railroad Company; neither does Keats or Ewing, but with that exception, the two blocks are surrounded by streets.

37. The question was asked you, and that which I desire you to answer, is whether or not there is any street along what would be Jane street and Ewing avenue and Keats avenue if they were extended across the right of way of the Louisville and Nashville Railroad Company—if there is any street along there now?

A. There is no street dedicated across the Louisville and Nashville Railroad Company at those three points now.

38. The map you have before you does not show all the property along Frankfort avenue between Cavewood avenue and Raymond avenue, does it?

A. It does not show any of the property on the southern side.

93 39. Does not show any of the streets on that side of Frankfort avenue?

A. It does not.

40. I believe you spoke of Sycamore street or avenue. Do you know whether that street has ever been dedicated, or not?

A. I do know that it has been dedicated.

41. By whom, and when and how?

A. I don't recall the names of the parties dedicating it; it was by

subdivisions of property in that section, and also by the sales of lots on the street.

42. When was this property, including Sycamore street, or avenue, as you call it, annexed to the city of Louisville?

A. I think it was in the year 1899.

43. Has the general council of the city of Louisville, by ordinance, accepted Sycamore street as a principal public street of this city?

A. I do not know of any formal acceptance of any of the streets by the general council.

44. You merely know what you gather from the records in your office and the county clerk's office?

A. That is all.

45. The records in your office are made under your supervision and directly from the information you gather at the county clerk's office?

A. They are.

46. You would not undertake to say then of your own knowledge that Sycamore avenue or street is a principal public street as provided by law, would you?

A. That depends upon what you mean by "as provided by law." I took it that it was a dedicated street, from all the information
94 that I could gather upon the subject; otherwise I would not have laid it out in the city maps as a dedicated street.

47. In so laying it out on your maps, you were merely acting upon your own opinion in the matter, were you not?

A. No, sir.

48. Upon what did you act?

A. Upon the copies of subdivisions and the sale of lots on the street.

49. Well, from that information you assumed that it was a public street of the city, did you?

A. I did not assume it; I knew it to be.

50. You don't know of any resolution of the general council accepting it?

A. Excuse me; possibly I didn't understand that last question.

Question 49 read to witness.

A. I knew it to be a dedicated street.

51. But you did not and do not know whether it is a principal public street of the city of Louisville and has been accepted as such by the general council by ordinance, do you?

A. I don't know of any acceptation of the street as a public street by the general council of the city of Louisville.

52. What streets, if any, are there south of Frankfort avenue between Cavewood and Raymond?

A. The next street south of Frankfort avenue is Payne street.

53. I mean, street running north and south?

A. Bergemyer and Raymond are streets intersecting Frankfort avenue opposite the property specified, that I know of; I think that Rastetter street also intersects it.

(By Mr. BRUCE:)

54. That is on the south side of Frankfort avenue that you are speaking of?

95 A. Yes; on the south side.

(Mr. FURLONG resumes:)

55. Are those the only streets on that side of Frankfort avenue?

A. They are the only streets that I can recall opposite the property specified on this diagram marked "Exhibit A."

56. Are you familiar enough with the locality to say that the streets on the southerly side of Frankfort avenue between Cavewood avenue and Raymond avenue could be extended northwardly across and into the property on the northerly side of Frankfort avenue without interfering with the streets at present located on the northerly side so as to form regular blocks or squares?

A. Yes; I am sufficiently acquainted to say to that question that they could not be.

57. Would you consider the property between Frankfort avenue and the right of way of the Louisville and Nashville Railroad Company and Clifton avenue and Ewing avenue, as being defined into squares?

A. No; I do not consider it as being defined into squares.

Re-direct examination by Mr. BRUCE:

58. You have been asked by Mr. Furlong whether or not there has been any formal action taken by the general council accepting Sycamore street as a street of the city of Louisville. I will ask you if it is not a fact that it has been very rare for the general council of the city of Louisville to pass resolutions formally accepting streets as public streets in the city of Louisville?

A. Yes; it is rare.

59. Has it not been the custom of the city of Louisville for many years in determining whether or not a block was bounded on all sides by principal streets, to treat as principal streets those

96 which had been dedicated without reference to whether they had been formally accepted by the city, or not?

A. The city has never allowed that question to interfere as to whether the streets were *formerly* accepted or not.

Re-cross-examined by Mr. FURLONG:

60. In speaking about the council accepting streets, you don't mean to include the time since the adoption of the present charter of cities of the first class, do you?

A. I don't mean to include the time previous to the adoption of the charter, because by that instrument they may have all been accepted generally. I have reference chiefly to the streets since the adoption of the present time.

61. Don't you know that it has been the practice, and is a fact, that since the adoption of the present charter in 1893, the general council does accept dedication of streets on the recommendation of the board of public works, and that the law requires that to be done before it is a public street?

A. I know of very few instances where streets were accepted formally by the general council.

62. How many dedications of streets do you know of since the adoption of the present charter of the city of Louisville?

A. I know of a very large number.

63. Will you name some of them?

A. Many of the streets that were included in the annexed suburbs were dedicated.

64. We are speaking now of streets dedicated since 1893.

A. Yes; I say there were a good many streets dedicated since 1893 that are now part of the city of Louisville. Oh!, it would be difficult for me to name them—I could say possibly in that section of the city you speak of, I think Bayless avenue is one recently dedicated.

65. Is that in John S. Cain's subdivision?

97 A. No; that is in the subdivision known as Aubondale. Coral avenue is in the same section. Belleaire street. St. Joseph street Park avenue, I think. I could specify many others if I was in my office so that I could refresh my — from my maps.

66. If I understand you correctly, the street- you have named are streets which have been dedicated since 1893, and about which the general council has taken no action as to accepting or rejecting them?

A. Well, you asked me, if I understood the question, what streets were dedicated since 1893.

67. Well, then, I will ask you if you know whether or not the general council has taken any action regarding the streets which you have mentioned as having been dedicated since 1893?

A. They have not taken any special action on any one of those streets especially. The action that they took by annexation might be considered as accepting them.

68. Do you know where the John S. Cain subdivision is?

A. He has one subdivision west of 18th street.

69. That is the one to which I refer.

A. Yes, I know that subdivision.

70. Don't you know it to be a fact that the general council by ordinance accepted the dedications of all streets in that subdivision?

A. I think they did by special action.

71. Do you know of any other instances of the kind?

A. I can't recall any just now.

72. You have no connection with that branch of the municipal government, have you?

A. I have not.

73. You have no connection with the board of public works whose duty it is to determine what a square is in street assessment
98 matters, have you?

A. I have none.

74. You don't know how they arrive at their assessments, or what property *that* tax, do you, except in a general way, of course?

A. I have nothing to do with it; I am pretty well informed, though, upon the matter in which they usually proceed; but I have no official connection with the department.

STATE OF KENTUCKY, }
Jefferson County, } *ss:*

I, J. K. Avey, a notary public in and for said county and State, certify that the foregoing deposition of D. F. Murphy was taken by agreement, before me, at the time and place, and in the action mentioned in the caption; that said witness was first duly sworn by me that the evidence he would give in said case would be the truth, the whole truth, and nothing but the truth; that said deposition was taken by me in shorthand, and a full and accurate transcript of same made by me; that the reading of said deposition by said witness and his signature to same were waived by counsel; that Mr. William Furlong appeared for plaintiff, Mr. Helm Bruce appearing for defendant.

Witness my hand, this January 30, 1902. My commission expires February 24, 1902.

J. K. AVEY,
N. P. J. C., Ky.

99 STATE OF KENTUCKY, }
County of Jefferson. }

I, John H. Page, clerk of the Jefferson circuit court, do hereby certify that the foregoing *100* pages contain a full, true and complete transcript of the record and proceedings in the action wherein Barber Asphalt Paving Company is plaintiff, and Louisville & Nashville Railroad Company, &c., are defendants, # 29790, as the same appears of record and now on file in my said office.

Witness, John H. Page, clerk of said court, this 21st day of August, 1903.

JOHN H. PAGE,
Clerk Jefferson Circuit Court,
By LEWIS MERRIWETHER,
Deputy Clerk.

Transcript fee, $41.00

100 Upon the foregoing transcript the following statement was made:

Statement of Appeal.

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
THE BARBER ASPHALT PAVING COMPANY & CITY OF Louisville, Appellees. } Statement.

The judgments appealed from herein were entered on June 17th, 1902, and June 20th, 1903, and may be found in this record on pages 54 and 72 respectively.

The clerk will issue summons to Jefferson county against the Barber Asphalt Paving Company and the City of Louisville on the appeal herein from the judgment of June 17th, 1902. Appellant desires an appeal granted by the clerk of the court of appeals from that judgment. The appeal from the other judgment (June 20th, 1903) was granted by the court below.

HELM, BRUCE & HELM,
Att'ys for Appellant.

Filed Aug. 24, 1903.

S. J. SHACKELFORD, *C. C. A.*

101 Upon the filing of the foregoing transcript and statement the clerk of said court of appeals granted an appeal as requested in the statement, and issued process, which was returned executed in full.

Afterwards at a court of appeals held in and for the Commonwealth of Kentucky at the capitol in Frankfort, Kentucky, on the 10th day of November, A. D. 1903, the following order was entered herein:

Submission in Ct. of App.

LOUISVILLE & NASHVILLE RAILROAD CO.
v.
BARBER ASPHALT PAV. CO., &c. } Jefferson.

Came the appellees by counsel and moved the court to affirm the judgment herein as a delay case, and the case is submitted on the motion and in chief.

Afterwards, to-wit: on the 19th day of November, A. D. 1903, at a court of appeals held as aforesaid, the following judgment was entered herein, to wit:

Judgment of Court of Appeals.

LOUISVILLE & NASHVILLE RAILROAD Company, Appellant, *vs.* BARBER ASPHALT PAVING CO. & CITY of Louisville, Appellees.	Appeal from the 1st. Div. Chancery Branch, Jefferson Circuit Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein. It is therefore ordered that said judgment be affirmed, which is ordered to be certified to said court. It is further considered that appellees recover of appellant their cost herein expended.

102 On the same day, the court, through Justice Paynter, delivered the following opinion:

Court of Appeals of Kentucky, November 19th, 1903.

LOUISVILLE & NASHVILLE R. R. Co., Appellant, *vs.* BARBER ASPHALT PAVING CO., &c., Appellees.	Appeal from Jefferson Circuit Court (Ch'y (1st) Div.).

Opinion of the Court by Judge Paynter.

The appellant owns the perpetual right of way over a strip of land, which parallels the street improved under the city ordinance. It is admitted by counsel that the facts of this case raise the question decided in Figg *v.* Louisville & Nashville R. R. Co., 25 R., 350. The opinion in that case reads as follows:

"The main line of the Louisville & Nashville Railroad Company runs southwardly from near Tenth and Broadway streets, Louisville, Kentucky, to and beyond Nashville, Tennessee. Its right of way is sixty feet in width. Under appropriate proceedings in the general council, Magnolia avenue was improved by original construction, and the taxing district was properly designated. Within that district east of Seventh street and south of Magnolia avenue, is a parcel of land sixty feet wide used by the appellee as a road bed, or what is commonly called the right of way, and as a part of it, a
103 triangular parcel north of Magnolia avenue and east of Seventh street.

It is insisted on the behalf of the railroad company that: (1)The property sought to be subjected to part of the cost of street improvement is only a right of way, and therefore, cannot be charged there-

with; (2) it receives no benefit from the improvement; (3) the right of way is not a lot in the meaning of the statute governing street improvement.

It is not the intangible right to use it, but the strip of land which the railroad company appropriates for its use and upon which it builds its road bed, is its right of way. The railroad company has been in possession of the strip of land in question for fifty years. It is a part of a great railroad system. Its right of way is perpetual. In Elizabethtown, Lexington & Big Sandy R. R. Co. *v.* Combs, 10 Bush, 393, the court held the injury resulting from the location of a railroad in such proximity to adjacent property so that smoke, soot and fire from passing engines was thrown, blown into or upon it, entitled the owner to a single recovery, as the injury was permanent and enduring. In other words, the court regarded that, the railroad had appropriated it for all time to come, and the injury would be permanent. It is the very remotest possibility imaginable that the appellee would ever abandon its right of way. The court concludes that, its use of its right of way will be perpetual. It is, therefore, practically the owner of the land. If this strip of land was not occupied by the railroad company as a right of way, it would not be sug-
104 gested that it was not subject to the special tax for street improvement. The purpose for which the lot is used cannot affect the question of its liability for the cost of street improvement. Counsel for appellee calls attention to cases of other courts holding that rights of way cannot be charged with the cost of street improvement; while, on the other hand, counsel for the appellant calls attention to cases of other courts holding that such rights of way are liable for such cost. It is not necessary to discuss this class of cases further, because this court in Louisville, Cincinnati & Lexington R. R. Co., and Louisville Railroad Transfer Co. *v.* Obst and Stengel, &c., Mss. opinion, Feb. 23, 1875, City of Ludlow *v.* Cincinnati Southern R. R. Co., 78 Ky., 357, held that such special taxation could be imposed."

On the second question we quote from Preston *v.* Rudd, &c., 84 Ky., 156, which reads as follows:

"Such assessments are made upon the assumption that a portion of the community are specially benefited by the improvement; the principle is that the territory is benefited; that it has a common interest, and that, governed by equitable rules, it must equally bear the burden. Necessarily, individual cases of hardship will arise; but it approaches equality as nearly as it is practicable. It follows that a lot owner may be compelled to pay his proportion of the cost of an improvement, although in his particular case his property may not be benefited.

This rule, however, can not be so extended as to entirely take
from the citizen his property. This would work 'a manifest
105 injustice.' It would be spoilation, and not taxation. Under the guise of benefit and taxation, he can not be thus arbitrarily deprived of his property.

It would be but an appropriation of it, by the exercise of an arbitrary power, to public use without compensation. * * *."

We do not understand that Barfield, &c, *v.* Gleason, &c., 23 R., 128, changes the rule announced in Preston *v.* Rudd, &c., and other cases of this court. Spoilation is not shown in this case.

Under the statute governing street improvement, a lot is any piece of land within the territory defined by the statute,

"or the general council, where the territory to be assessed is not bounded by principal streets. The use or non-use or the character of the use to which the parcel of land is put does not determine the question whether it is or is not a lot. The strip of land used by the railroad company the day before it was appropriated by it as a right of way, was a lot in the meaning of the statute, and to thus appropriate it cannot change its character."

The judgment is affirmed.

Helm, Bruce & Helm, for appellant.
William Furlong, B. F. Washer, for appellees.

106 Afterwards, on the 17th day of December, A. D. 1903, the appellant by counsel filed in the clerk's office of said court its writ of error (2 copies of which are on file in my office), as follows:

107 UNITED STATES OF AMERICA,
Western District of Kentucky, Sixth Judicial Circuit, } *ss:*

The President of the United States to the honorable the judges of the court of appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you or some of you, between The Louisville & Nashville Railroad Company, appellant, against The Barber Asfelt Paving Company & The City of Louisville, appellees a manifest error hath happened, to the great damage of the said Louisville & Nashville Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, District of Columbia, on the* 14th day of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that

error, what of right, and according to the laws and customs of th United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of th United States, the 16th day of December, in the year of our Lor one thousand nine hundred and three, and of the Independence o the United States of America the one hundred and twenty-eigh

[Seal 6th Circuit Court, Wes. Dist. Ky., U. S. of America.]

THOS. SPEED,
Clerk of the Circuit Court of the United States
for the Western District of Kentucky,
By HENRY F. CASSIN,
Deputy Clerk.

Allowed Dec. 17, 1903 by
A. R. BURNAM,
Chief Justice Court Appeals, Ky.

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* Not exceeding 30 days from the day of signing the citation.

[Endorsed:] 1903 Dec'r 17. Filed. Att.: S. J. Shackelford, cl'k.

108 On the same day the appellant by counsel filed in said clerk's office the bond, which was approved by the chief justice of said court, and is as follows:

Bond.

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
THE BARBER ASPHALT PAVING COMPANY and CITY OF LOUISville, Appellees.

Know all men by these presents. That we, the Louisville and Nashville Railroad Company and Helm Bruce are held firmly bound unto the Barber Asphalt Paving Company and the City of Louisville in the sum of seven thousand dollars, to be paid to the said The Barber Asphalt Paving Company and the City of Louisville and each of them, and their successors. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this seventeenth (17th) day of December, A. D. 1903.

Whereas, the above named Louisville and Nashville Railroad Company hath prosecuted its writ of error from the Supreme Court of the United States to the court of appeals of Kentucky to reverse

the judgment rendered in the above entitled suit, by the said court of appeals of Kentucky.

Now, therefore, the condition of this obligation is such, that if the above named Louisville and Nashville Railroad Company shall prosecute its said writ of error to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, [L. S.]
By HELM BRUCE, *Att'y.* [L. S.]
HELM BRUCE. [L. S.]

Dec. 17, 1903.

Sealed and delivered in presence of

A. R. BURNAM,
Chief Justice Court of Appeals, Ky.

On the same day the appellant filed in said clerk's office, its assignment of errors and prayer for reversal herein, which is in words and figures following, to-wit:

Assignment of Errors.

Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD Company, Pl'ff in Error,
vs.
THE BARBER ASPHALT PAVING COMPANY and City of Louisville, Def'ts in Error.
} Assignment of Errors and Prayer for Reversal.

Plaintiff in error, The Louisville & Nashville Railroad Company, assigns the following errors in the judgment of the court of appeals of Kentucky herein, viz:

1st. The court erred in holding that a lot owner may be compelled to pay a part of the cost of improving a street adjacent to such lot, where the part which he is thus compelled to pay is fixed, not by a system of general taxation, but of special assessment, based on pretended special benefits to the property assessed, even though his said property or lot has not in fact been benefited at all by such alleged street improvement; and erred in holding that the property of plaintiff in error described in the pleadings, viz: a section of its railroad right of way, was properly assessable and liable under a system of special assessment based on

pretended special benefits to the property assessed, as prescribed by the statute of Kentucky and ordinances of the city of Louisville herein involved for a part (viz: $3176.72/100) of the cost of improving a street running parallel to said right of way, although said right of way was not benefited, but, on the contrary, was impaired in value, by the improvement of said street; and erred in holding that to subject said section of said right of way to the payment of said part of the cost of said improvement, which part was ascertained, not under a system of general taxation, but of special assessments based on pretended special benefits to the property assessed, did not deprive plaintiff in error of its property without due process of law, nor deprive it of the equal protection of the laws, contrary to the provisions of the Constitution of the United States.

2nd. The court erred in holding that the property of plaintiff in error was liable for any part of the cost of improving the street described in the pleadings under the ordinance therein referred to.

3rd. The court erred in affirming the judgment of the Jefferson circuit court herein.

111 Wherefore plaintiff in error prays that the judgment of the court of appeals of Kentucky herein be reversed and that said court be directed to reverse the judgment of the Jefferson circuit court with directions to dismiss the petition as against this plaintiff in error, The Louisville & Nashville Railroad Company.

HELM, BRUCE & HELM.
Att'ys for Plaintiff in Error.

Afterwards, on the 19th day of December, 1903, the appellant and plaintiff in error filed the following stipulation herein:

Stipulation of Counsel.

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
THE BARBER ASPHALT PAVING COMPANY, &c., Appellees.

Stipulation of counsel.

It is hereby agreed between counsel for all parties in the above entitled cause that neither the map which is filed as Exhibit B with the report of the special commissioner William W. Crawford, nor the map filed as Exhibit A with the deposition of the witness D. F. Murphy is material to the consideration of any question to be consid-red by the court on the writ of error from the Supreme Court of the United States to the court of appeals of Kentucky; and that

said maps which are intricate and voluminous may be
112 omitted from the record to be transmitted to the Supreme Court, without prejudice to the rights of any party.

HELM, BRUCE & HELM,
Att'ys for Louisville & Nashville Railroad Company.
BENJAMIN F. WASHER,
Att'y for Barber Asphalt Paving Company.
HENRY L. STONE,
Att'y for the City of Louisville.

113 COMMONWEALTH OF KENTUCKY, } *sct:*
Court of Appeals, }

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, hereby certify that the foregoing one hundred and thirteen (113) pages, (a to and including 112) contain a true, full and complete transcript of the record and proceedings had in said court of appeals in the case of Louisville & Nashville Railroad Company, appellant, against The Barber Asphalt Paving Co. and City of Louisville, appellees, except the maps referred to as Exhibits "A" and "B," which are not copied by agreement of parties (see stipulation on page 111); together with the original writ of error (two copies of which remain on file in my office) and copies of the bond and assignment of errors, as the same appears from the records and files of my office. The original citation is also returned with this transcript.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Ky., this 28th day of December A. D. 1903.

[Seal Kentucky Court of Appeals.]

SAMUEL J. SHACKELFORD,
Clerk of the Kentucky Court of Appeals,
By ROBERT L. GREENE, *D. C.*

Fee for this transcript $40.00.

Endorsed on cover: File No. 19,192. Kentucky court of appeals. Term No. 541. The Louisville and Nashville Railroad Company, plaintiff in error, *vs.* The Barber Asphalt Paving Company & The City of Louisville. Filed January 8", 1904. File No. 19,192.